154 U.S. 134

154 — 134

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1062.

THOMAS ST. CLAIR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED NOVEMBER 6, 1893.

(15446.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 1062.

THOMAS ST. CLAIR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Transcript from district court	1	1
Indictment	1	1
Order remitting indictment to circuit court	5	2
Clerk's certificate	6	3
Order araigning prisoners, etc	8	3
Order continuing trial	10	4
Order appointing counsel, and extending time to withdraw plea	11	4
Demurrer to indictment	12	5
Order overruling demurrer, etc	13	5
Minutes of trial	15	6
Charge to the jury	24	9
Verdict	22	8
Judgment	33	12
Clerk's certificate to judgment roll	35	13
Motion for new trial	36	14
Motion in arrest of judgment	38	15
Bill of exceptions	40	15
Challenges to jury, etc	40	15
Evidence for the United States	46	18
Testimony of F. O. Sodergren	46	18
John Lucas	60	25
F. O. Sodergren (recalled)	65	27
Edward Larsen	67	28
Ah Hong	75	32
Thomas Green	77	33

	Original.	Print.
Bill of exceptions—Continued.		
Evidence for the United States—Continued.		
Testimony of Jens Olsen	89	38
John Langlais	90	39
W. J. McCoy	93	41
Mrs. F. O. Sodergren	95	42
Pandy Secaria	96	42
Henry Westerlind	100	44
M. P. Luck	102	45
Arthur Price	102	45
Thomas Price	104	46
F. O. Sodergren (recalled)	108	48
Thomas Green (recalled)	110	49
Jens Olsen (recalled)	117	53
Evidence for defendant	118	53
Testimony of Edward J. Livernash	118	53
Defendant's requests	119	54
Verdict	120	54
Order for sentence	120	54
Motion for new trial overruled	121	55
Motion in arrest of judgment, etc	121	55
overruled	122	55
Sentence	122	55
Judge's certificate to bill of exceptions	123	56
Petition for writ of error	124	56
Assignment of errors	126	57
Order allowing writ of error, etc	134	61
Clerk's certificate	135	61
Writ of error	136	61
Return on writ of error	137	62
Citation	138	63
Proof of service of citation	139	63

United States of America.—In the district court of the United States for the northern district of California.

At a stated term of said court begun and holden at the city and county of San Francisco, within and for the northern district of California, on the first Monday of February, in the year of our Lord one thousand eight hundred and ninety-three.

The grand jurors of the United States of America, within and for the northern district of California, upon their oath present: That Thomas St. Clair, Herman Sparf, and Hans Hanson, mariners, late of the northern district of California, heretofore, to wit, on the thirteenth day of January, in the year of our Lord, one thousand eight hundred and ninety-three, with force and arms, on the high seas, and within the jurisdiction of this court, and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, in and on board of a certain American vessel, the same then and there being a bark called and named the "Hesper," then and there belonging to a citizen or citizens of the said United States of America, whose name or names is or are to the the grand jurors aforesaid unknown, in and upon one Maurice Fitzgerald, then and there being on board said vessel, did piratically, willfully, feloniously, and of malice aforethought

make an assault; and that the said Thomas St. Clair, Herman
2 Sparf, and Hans Hanson, with a certain instrument or weapon (the character and name of which are to the grand jury unknown), then and there held in the hands of one of said persons, viz, Thomas St. Clair, Herman Sparf, and Hans Hanson (but of which particular one is to the grand jurors aforesaid unknown), the said Thomas St. Clair, Herman Sparf, and Hans Hanson, in and upon the head of him the said Maurice Fitzgerald, and upon other parts of his body (to the grand jurors aforesaid unknown), did then, to wit, on the said thirteenth day of January, in the year of our Lord one thousand eight hundred and ninety-three, and there, to wit, on the high seas as aforesaid in and on board of the said American vessel and on the high seas, as aforesaid, and within the admiralty and maritime jurisdiction of the said United States of America, and within the jurisdiction of this court and out of the jurisdiction of any particular Statee of the said United States of America, then and there piratically, willfully, feloniously, and with malice aforethought strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald several grievous, dangerous, and mortal wounds; and did then and there, to wit, at the time and place last above mentioned, him the said Maurice Fitzgerald cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him the said Maurice Fitzgerald in the sea aforesaid; of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said Maurice Fitzgerald in and upon the high seas aforesaid, out of the jurisdiction of any particular State of

the United States of America, then and there instantly died. And
3 the grand jurors aforesaid, upon their oath aforesaid, do say, that by reason of the casting and throwing the said Maurice Fitzgerald

in the sea as aforesaid, they can not describe the said mortal wounds or the character and nature of said weapon or instrument.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Thomas St. Clair, Herman Sparf, and Hans Hanson, him the said Maurice Fitzgerald at the time and place as aforesaid, upon the high seas as aforesaid, out of the jurisdiction of any particular State of the United States America, in and upon the said American vessel, within the jurisdiction of the United States of America and of the admiralty and maritime jurisdiction of the said United States of America and of this court, in the manner and form aforesaid, piratically, willfully, feloniously, and with malice aforethought, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America, in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further find and present that the northern district of California of the United States of America is the district into which the said Thomas St. Clair, Herman Sparf, and Hans Hanson were first brought after committing said offense.

CHAS. A. GARTER,
United States Attorney.

Names of witnesses examined before the said grand jury on finding the foregoing indictment: F. O. Sodergren, John Lucas, Pandy
4 Zacaria, Thomas Green, John Jens Olsen, H. Westerling, Ah Hong, John Langlais.

(Endorsed:) Indictment for murder of Maurice Fitzgerald, on board American bark "Hesper." A true bill. E. J. Bowen, foreman. Presented and filed in open court this 5th day of May, A. D. 1893. Southard Hoffman, by J. S. Manley, deputy clerk. Thomas St. Clair, Herman Sparf, and Hans Hanson, arraigned May 10, 1893, and plead not guilty, and allowed till 17th of May, 1863, to withdraw plea, if they or either of them see fit so to do. May 17th, 1893, time extended to May 22d. May 22d, extended to 24th. May 24th, 1893, plea not guilty withdrawn & demurrer filed. Dem. arg., sub., & denied. Pris'rs arr'd, plead each not guilty, ord. trial June 14, 1893. On June 14, 1893, pris'rs granted separate trials. On June 14, 15, 16th, 17th, 19, and 20th, Thos. St. Clair tried, & on said 20th June Thos. St. Clair convicted. July 5, 1893, Thos. St. Clair sentenced to be hung.

5 *Order Remitting Indictment.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court room, in the city of San Francisco, on Friday, the 5th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The honorable Wm. W. Morrow, judge.

THE UNITED STATES OF AMERICA,
vs.
THOMAS ST. CLAIR, HERMAN SPARF, AND Hans Hanson. } No. 2929.

On motion of Charles A. Garter, esquire, United States attorney, it is by the court now here ordered that the indictment found against the

defendants above named, now on file in this court, be remitted to the next session of the circuit court of the United States, ninth circuit, and northern district of California, for trial.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled case.

Attest my hand and seal of said district court this 6th day of May, A. D. 1893.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*
By J. S. MANLEY, *Deputy Clerk.*

6 *Certificate of clerk of district court as to remitted record.*

United States district court, northern district of California.

THE UNITED STATES OF AMERICA,
vs.
THOMAS ST. CLAIR, HERMAN SPARF, AND HANS HANSON.

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify that at a stated term of the United States district court for the northern district of California, to wit, the February, 1893, term thereof, it was by the said court ordered that indictment No. 2929, found against the defendants above named, be remitted to the next session of the United States circuit court for the ninth circuit and northern district of California, and in pursuance of said order, I do hereby certify the annexed indictment to be an original indictment found against said defendants above named, and I do remit the same to the said circuit court of the United States for the ninth circuit and northern district of California.

In witness whereof I have hereunto set my hand and affixed the seal of the said district court, this 6th day of May, A. D. 1893.

[SEAL.] SOUTHARD HOFFMAN,
Clerk U. S. District Court, Northern District of California.

7 (Endorsed:) No. 2178. U. S. circuit court, northern district of California. The United States of America vs. Thomas St. Clair et al. Record remitted from U. S. district court. Filed May 6, 1893. L. S. B. Sawyer, clerk.

8 *Order arraigning prisoners, &c.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Wednesday, the 10th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA,
vs.
THOMAS ST. CLAIR, HERMAN SPARF, AND HANS HANSON.
No. 2173. Indictment for murder on the high seas, &c.

Indictment remitted from the United States district court for the northern district of California.

And now comes Charles A. Garter, esq., United States attorney, and moves the court that the prisoners, Thomas St. Clair, Herman Sparf, and

Hans Hanson, present in open court, be arraigned to plead. The said prisoners being asked by the court if they had counsel replied that they had not and had no means with which to employ counsel, and that they desire the court to appoint some attorney of the court to act as
9 counsel for them. The court thereupon appointed F. J. Kierce, esq., to act as their counsel for the purposes of this arraignment. The said prisoners were thereupon arraigned, and the indictment having been read to them they were each asked if they pleaded guilty or not guilty. They each thereupon, individually and by their counsel, replied that they were not guilty. On motion of F. J. Kierce, esq., said prisoners were allowed till Wednesday, the 17th inst., at 10:30 a. m., to withdraw their several pleas if they or either of them should be so advised.

10 *Order continuing trial.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Wednesday, the 17th day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA, *vs.* THOMAS ST. CLAIR, HERMAN SPARF, AND Hans Hanson.	No. 2173. Indictment for murder on the high seas, &c.

Indictment remitted from the United States district court for the northern district of California.

By consent of counsel, Charles A. Shurtleff, esq., assistant United States attorney for the United States, and F. J. Kierce, esq., for the prisoners, it is ordered that this cause be, and the same hereby is, continned to Monday, the 22d inst., at eleven o'clock a. m.

11 *Order extending time to withdraw plea.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 22d day of May, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA, *vs.* THOMAS ST. CLAIR ET AL.	No. 2173. Indictment for murder on the high seas, &c.

Charles A. Garter, esq., United States attorney, being present and the prisoners, Thomas St. Clair, Herman Sparf, and Hans Hanson, being present in open court, it is ordered that F. J. Kierce and J. F. Smith, esqs., act as counsel for said prisoners. It is further ordered that the time within which the pleas of said prisoners may be withdrawn be extended to Wednesday next, the 24th inst.

In the circuit court of the United States in and for the northern district of California.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THOMAS ST. CLAIR, HERMAN SPARF, AND HANS HANSON, defendants.

The above-named defendants, and each of them, now come and demur to the indictment on file against them in this court charging them with murder, upon the grounds that the same does not state facts constituting a public offense.

2. That the said indictment is uncertain in this:

(a) It fails to show upon what portion of the high seas the alleged offense attempted to be charged in the indictment was committed.

(b) It fails to show which one of the defendants, if any, committed the alleged assault attempted to be charged in the indictment; it also fails to show whether one, or more, of the defendants committed any of the acts charged against them in the indictment.

J. F. SMITH & F. J. KIERCE,
Attorneys for Defendants.

(Endorsed): Filed May 24, 1893. L. S. B. Sawyer, clerk.

13 *Order overruling demurrer and plea of defendants.*

At a stated term, to wit: the February term A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Wednesday the 24th day of May in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA
vs.
THOMAS ST. CLAIR ET AL.
No. 2173. Indictment for murder on the high seas, &c.

Charles A. Garter, esq., United States attorney, appearing on behalf of the United States, and the prisoners, Thomas St. Clair, Herman Sparf, and Hans Hanson, being present in open court in person and F. J. Kierce, esq., one of their counsel, the said prisoners withdrew their plea of not guilty and file a demurrer to the indictment herein. Said demurrer was thereupon argued by the respective counsel and submitted to the court for consideration and decision. And the same having been duly considered, it is ordered that said demurrer be, and the same hereby is, overruled and

14 the said prisoners, Thomas St. Clair, Herman Sparf, and Hans Hanson thereupon were again arraigned, and each having been asked if he pleaded guilty or not guilty, replied that he pleaded not guilty. It is ordered that said prisoners be remanded to the custody of the United States marshal for the northern district of California, to await trial on the 14th day of June next.

15 *Minutes of trial.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Wednesday, the 14th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* THOMAS ST. CLAIR, HERMAN SPARF, AND Hans Hanson. } No. 2173. Indictment for murder committed on the high seas, &c.

The issue joined between the United States of America and the prisoners, Thomas St. Clair, Herman Sparf, and Hans Hanson, came on this day for trial, Charles A. Garter, esq., United States attorney, appearing for the United States, and F. J. Kierce, esq., and J. F. Smith, esq., appearing for said prisoners, move the court for a separate trial for each prisoner. The motion not being opposed by the United States attorney, it is ordered that a separate trial for each prisoner be and the same hereby is granted, and the trial of said Thomas St. Clair was thereupon begun, and counsel for said prisoners challenge the panel of the trial jurors which

16 challenge was argued by the respective counsel and submitted to the court for consideration and decision; and, the same having been duly considered, it was ordered that said challenge be and the same hereby is denied. The following-named persons were then examined, accepted, and sworn as trial jurors herein: Peter McIntire, S. D. Mathews, Thomas Brown, Frederick Jackson, A. E. Cohn, John E. Savage, and Frederick Seller.

It is ordered that the marshal of the United States of America for the northern district of California summon twenty-five talesmen to be and appear in said circuit court to-morrow forenoon, the fifteenth instant, at ten o'clock, to serve as trial jurors herein.

17 *Minutes of trial.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Thursday, the 15th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* THOMAS ST. CLAIR. } No. 2173. Indictment for murder committed on the high seas, &c.

The United States attorney and counsel for the prisoner, Thomas St. Clair, present.

Thereupon counsel for said prisoner challenged the talesmen summoned herein. And the said challenge having been considered by the court, it is ordered that said challenge be, and the same hereby is, denied.

The following named persons were then examined, accepted, and sworn as trial jurors herein: H. P. Fletcher, William Giblin, John Barneson, W. D. Witham. It is ordered that the marshal of the United States for the northern district of California, summon twenty talesmen to be and appear in said circuit court this afternoon at 2 o'clock.

18 Two o'clock p. m., C. Margini was then examined, accepted, and sworn as a trial juror herein. Counsel for the prisoner then challenge the panel, which said challenge was denied by the court. Thereupon the indictment herein was read to the jury by the clerk of the court, and Charles A. Garter, esq., United States attorney, opened for the United States. F. O. Sodergren was then sworn and examined as a witness for the United States.

19 *Minutes of trial.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Friday, the 16th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA vs. THOMAS ST. CLAIR. } No. 2173. Indictment for murder committed on the high seas, &c.

Counsel and the prisoner and the jury present.

Thereupon the trial of this cause was resumed and F. O. Sodergren, a witness for the United States, continued his testimony. John Lucas was sworn and examined as a witness for the United States, and F. O. Sodergren was recalled as a witness for the United States. Edward Larsen was then sworn and examined as a witness for the United States. Defendant's Exhibit 1 was introduced, and Ah Hong, Thomas Green, Jens Olsen, and John Langley were sworn and examined as witnesses for the United States.

20 *Minutes of trial.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Saturday, the 17th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA vs. THOMAS ST. CLAIR. } No. 2173. Indictment for murder committed on the high seas, &c.

Counsel and the prisoner, Thomas St. Clair, and the jury present.

Thereupon the trial of this cause was resumed, and the following named persons were sworn and examined as witnesses for the United

States: W. J. Coey, jr., F. O. Sodergren (recalled), Mrs. F. O. Sodergren, Pandy Zacaria, Henry Westerlind, M. P. Luck. United States Exhibit A was introduced.

21 *Minutes of trial.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 19th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* THOMAS ST. CLAIR. } No. 2173. Indictment for murder committed on the high seas, &c.

Counsel and the prisoner, Thomas St. Clair, and the jury present.

Thereupon the trial of this cause was resumed, and the following-named persons were sworn and examined as witnesses for the United States: Arthur F. Price, Professor Thomas Price, F. O. Sodergren (recalled), Thomas Green (recalled), and Jens Olsen (recalled), and United States Exhibits B, C, and D were introdnced. The United States rest. Edward J. Livernash was then sworn and examined as a witness for the prisoner, Thomas St. Clair, and counsel for said prisoner rest. Thereupon Charles A. Garter, United States attorney, commenced his argument for the United States.

22 *Minutes of trial.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Tuesday, the 20th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* THOMAS ST. CLAIR. } No. 2173. Indictment for murder committed on the high seas, &c.

Counsel, and the prisoner, Thomas St. Clair, and the jury present.

The trial of this cause was resumed. The argument of James F. Smith, esq., of counsel for the prisoner, was commenced and closed, and Charles A. Garter, esq., United States attorney closed his argument for the United States. Thereupon the cause, after the instructions of the court, was submitted to the jury. Honorable William W. Morrow, United States district judge, at this point having taken a seat upon the bench with Judge McKenna. The jury returned and rendered the following verdict:

"We, the jury, find Thomas St. Clair, the prisoner at the bar, guilty.

"Foreman,

23 "FREDERICK SELLER."

It is ordered that sentence be pronounced on Thursday, July 6th, 1893.

In the circuit court of the United States in and for the northern district of California.

The Hon. Joseph McKenna, judge.

THE UNITED STATES
vs.
ST. CLAIR.

TUESDAY, *June* 20, 1893.

Charge to the jury.

The COURT. Gentlemen of the jury: this case is now about to be submitted to your consideration, and in that consideration the principles of law are as much an element as are the facts of the case; hence I invite your careful attention to the instructions I am about to give you.

The indictment is based upon section 5339 of the Revised Statutes, which provides, among other things, that "every person who commits murder upon the high seas or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or who upon and such waters maliciously strikes, stabs, wounds, poisons or shoots any other person, or which striking, stabbing, wounding, poisoning
25 or shooting such other person dies on land, or at sea, within or without the United States, shall suffer death."

The indictment charges that the defendant, Thomas St. Clair, Hans Hansen, and Herman Sparf, on the 13th day of January, 1893, on the high seas, on the bark Hesper, and within the admiralty jurisdiction of the United States, did kill and murder one Morris Fitzgerald.

To establish the offense charged in the indictment certain facts must, therefore, be proven by the prosecution with the strength of proof I shall hereafter define to you. These facts are that Morris Fitzgerald is dead; that he was killed on the high seas on the bark Hesper, in the manner and form described in the indictment, by the defendant, Thomas St. Clair, either alone or in combination with Hans Hansen and Herman Sparf. It must also be proved, with the same degree I have indicated, that the bark Hesper was an American ship, sailing under the American flag, and that San Francisco was the first American port to which the defendant was brought after such killing.

These facts being shown, it will be necessary to establish also, with the strength of proof I have indicated, that the killing was a murder.

What, then, is murder? There are only two kinds of felonious homicide known to the United States law. One is murder and the other is manslaughter. There are no degrees of murder. I mention this fact lest your experience on State juries with the State law would lead you to confusion. Indeed, gentlemen, there is no definition of murder by and United States statute. We resort to the common law for that.
26 By common law murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied.

Malice, then, is an element in the offence, and discriminates it from the other crime of felonious homicide which I have mentioned, to wit, manslaughter; that is, malice, express or implied, discriminates murder from the offense of manslaughter.

What is malice? It is not easy to define it in terms simpler than itself. It is somewhat technical in law, and is said to be express or implied. These terms, however, as Justice Field has observed, do not indicate different states of mind, but the same state of mind. The difference is one of proof, not of kind. Express malice exists when one by deliberate premeditation and design, formed in advance, to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes against a victim.

Implied malice is an inference of the law from any deliberate and cruel act committed by one person against another. The two kinds of malice, therefore, to repeat, indicate but one state of mind established in different ways, the one by circumstances showing premeditation of the homicide, the other by an inference of the law from the act committed; that is, malice is inferred when one kills another without provocation or when the provocation is not great.

Manslaughter is the unlawful killing of a human being without malice, either express or implied.

27 I do not consider it necessary, gentlemen, to explain it further, for if a felonious homicide has been committed of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder.

The law devolves certain duties on the prosecution in a criminal case, clothes the defendant with certain presumptions, and requires a certain strength of proof of his guilt. For instance, the law does not require the defendant to prove himself innocent. It imposes the burthen on the prosecution, to prove him guilty. In other words, the law presumes the defendant innocent, and this presumption should continue and prevail in your minds until you are satisfied from the evidence beyond a reasonable doubt of his guilt, and acting on this presumption, you should acquit him unless the evidence establishes his guilt beyond a reasonable doubt.

A reasonable doubt is that state of the mind which after a full consideration of all the evidence, leaves your minds in that condition that you can not say you feel an abiding faith amounting to a moral certainty from the evidence that the defendant is guilty of the crime charged against him.

In a case like this, a criminal case, the amount of proof required is different from the amount required in a civil case. In the latter, that is, in a civil case a mere preponderance of evidence is necessary. In this case the proof must be beyond a reasonable doubt, as I have explained to you. Mere probabilities, therefore, are not sufficient, nor is it sufficient that upon the doctrine of chances that it is more probable that the defendant is guilty than not guilty. The strength of proof must be such

28 that it will exclude any reasonable theory upon which he can be innocent; and you must find a verdict from the testimony in the case unaided, unassisted, and uninfluenced by any opinion, or presumption not founded upon the testimony.

As a matter of law, where a conviction for a criminal offense is sought upon circumstantial evidence alone, the Government must not only show by a preponderance of evidence, that the alleged facts and circumstances are true, but they must be such facts and circumstances as are incompatible upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the guilt of the accused. And in this case, if all the facts and circumstances relied on by the Government, to secure a conviction can be reasonably accounted for upon any reasonable theory consistent with the innocence of the defendant, you should acquit him.

If there is any one single fact proved to your satisfaction, by the preponderance of evidence which is inconsistent with his guilt, this is sufficient to raise a reasonable doubt and you should acquit him.

You are the exclusive judges of the credibility of the witness, and in judging of their credibility, you have a right to take into consideration their prejudices, motives, or feelings of revenge, if any such have been proven or shown, by the evidence in the case; and if you believe from the evidence that any witness or witnesses, have knowingly and wilfully testified falsely as to any material fact or point you are at liberty to disregard entirely the testimony of such witness or witnesses.

29 As to the statements made by the defendant, or by any other person in his hearing and presence, the same are to be received with care and caution, and besides being satisfied that the witness who testified to the statements speaks truly, you must be satisfied that the witness could not be, or was not mistaken, as to the substance of the statement.

If you believe from the evidence that Edward Larsen and Thomas Green, or either of them, were accomplices with the defendant, in the commission of the acts charged in the indictment, then I instruct you, that you are to act upon their testimony with great care and caution, and subject it to a careful examination in the light of all the other evidence in the case, and you ought further, not to convict upon their testimony alone unless you are satisfied, beyond any reasonable doubt, of its truth.

If you believe from the evidence, that the witnesses Edward Larsen and Thomas Green or either of them, or any other person, were induced to become witnesses and testify, by any promise of immunity from punishment, or by any hope held out to them from anyone that it would go easier with them in case they would disclose who their confederates were, or in case they implicated someone else in the crime, you should take this into consideration in determining the weight to be given to their testimony and it should he received with caution, and scrutinized with care.

While the Revised Statutes of the United States provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the Statutes expressly declares that his
30 neglect to testify shall not create any presumption against him, under any circumstances whatever.

At common law every person present at a murder, willingly aiding or abetting its perpetration, is guilty of murder, and may be indicted and convicted as principal in the first degree.

Therefore, gentlemen, if you believe from the evidence, under the instructions I have given to you, that Morris Fitzgerald was killed, and

that Thomas St. Clair did not do the act alone, but was present, willingly aiding or abetting its perpetration, I charge you he is guilty of murder, as charged in the indictment.

Do not misunderstand me. In giving you these instructions I may by accident assume facts to be proven. If so, you must disregard the assumption. It is not my purpose, nor is it my function, to assume any fact to be proven, nor to suggest to you that any fact has been proven. You are the exclusive judges of the facts. No matter what assumption may appear during the course of the trial, in any ruling of mine, or what may appear in any one of these instructions, you are to take this case and consider it, and remember you are the tribunal to which the law has referred the case and whose judgment the law wants on the case.

When you retire to your jury room you will select one of your number foreman. After you have deliberated upon the case and agreed upon a verdict you will return into court. The form of your verdict will be, if you find the defendant guilty, "We, the jury, find the defendant guilty of murder." If you find him not guilty your verdict will be "We, the jury, find the defendant not guilty."

31 (Endorsed:) Charge to jury delivered June 20, 1893. L. S. B. Sawyer, clerk.

32 U. S. circuit court, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA, *vs.* THOMAS ST. CLAIR. } Criminal, No. 2173.

We, the jury, find Thomas St. Clair, the prisoner at the bar, guilty.
Foreman,
FREDERICK SELLER.

(Endorsed:) Verdict. Filed June 20, 1893. L. S. B. Sawyer, clerk.

33 *Judgment.*

In the circuit court of the United States, ninth circuit, northern district of California.

THE UNITED STATES *vs.* THOMAS ST. CLAIR. }

And now at this day comes the above-named defendant, Thomas St. Clair, with his counsel, Messrs. Francis J. Kierce and James F. Smith, and also comes Charles A. Garter, esq., United States attorney for the northern district of California, appearing on behalf of the United States, and the said defendant, Thomas St. Clair, having heretofore been regularly and duly indicted by a grand jury of the United States for the crime of murder by the killing of one Maurice Fitzgerald, on the thirteenth day of January, in the year of our Lord one thousand eight hundred and ninety-

three, on the high seas and on board of the American barkentine "Hooper," and the said defendant, Thomas St. Clair, having been duly arraigned upon said indictment, and having made and entered a plea of not guilty thereto, and having been tried by a jury of the country, and by said jury found guilty of the said offense as charged in said indictment, and now being brought before this court to receive the sentence and the judgment of this court upon said verdict, and Charles A. Garter, esq., United States attorney, having moved that this court pass judgment and sentence,
34 thereupon counsel for the said defendant moved this court for a new trial; which motion, after argument of counsel, was denied, to which ruling counsel for the said defendant duly excepted. Counsel for said defendant then moved this court for an arrest of judgment; and after argument, duly heard and considered, the said motion for the arrest of judgment was thereupon denied. Counsel for the said defendant thereupon duly excepted to the ruling of the court denying said last-mentioned motion. Defendant was then asked by this court if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown this court proceeded to render judgment herein.

Whereas the said Thomas St. Clair, having been duly convicted in this court of the crime of murder, it is therefore ordered, adjudged, and decreed that the said Thomas St. Clair be taken hence by the marshal of this district and confined in close custody in the prison of this city and county until Friday, the sixth day of October next, and then be taken by the United States marshal to some suitable place in the district, and between the hours of one and four in the afternoon of that day be hung by the neck until he shall be dead. And it is further ordered that the United States marshal of this district do carry this sentence into execution.

Entered July 6th, 1893.

W. J. COSTIGAN, *Clerk.*

A true copy.
Attest:
[SEAL.] W. J. COSTIGAN, *Clerk.*

35 *Clerk's certificate to judgment roll.*

In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA
vs.
THOMAS ST. CLAIR ET AL. } No. 2173.

I, W. J. Costigan, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said circuit court this 11th day of July, 1893.

[SEAL.] W. J. COSTIGAN, *Clerk.*

(Endorsed:) Record. Filed July 11th, 1893. W. J. Costigan, clerk.

In the circuit court of the United States in and for the northern district of California.

UNITED STATES
vs.
THOMAS ST. CLAIR, DEFENDANT AND respondent.

Now comes the defendant in the above-entitled action and moves the court to set aside the verdict herein and for a new trial of this action upon the the following grounds, to wit:

1. The court was at the time of the trial of the action without jurisdiction of the subject-matter thereof or of the person of the defendant.

2. The indictment does not charge the commission of any offense against the United States or of any public offense by the defendant, nor does it charge the commission of any offense by the defendant of which the court had jurisdiction.

3. Errors in law occurring at the trial and duly excepted to by the defendant.

4. No proof was adduced at the trial showing or tending to show that the vessel upon which the offense was alleged to have been committed ever came to any port of the United States, or that it ever came to any port of the United States over which the district court of this district or said circuit court had or has, or ever had, jurisdiction.

5. There was no evidence showing or tending to show that any vessel upon which said alleged offense was committed, or on which the
37 defendant was placed, or ever was, ever came to any port of the United States or any port over which the said circuit court or district court ever had or has jurisdiction.

6. The jury was not empanelled as required by law and defendant was compelled to exercise his peremptory challenge as each juror was examined.

7. The death of Morris Fitzgerald was not shown.

8. The verdict of the jury is vague, uncertain, and indefinite, and does not show of what offense the jury found the defendant guilty, whether of murder, assault to murder, or manslaughter.

9. Irregularity in the proceedings of the court, jury, and the adverse party by which defendant was prevented from having a fair trial.

10. Insufficiency of the evidence to justify the verdict and that the verdict is against law.

The motion is made upon a statement and bill of exceptions.

SMITH & MURASKY,
FRANK J. KIERCE,
Attorneys for Defendant & Respondent.

(Endorsed:) Filed July 6, '93. W. J. Costigan, clerk.

In the United States circuit court, northern district of California.

THE UNITED STATES, COMPLAINANT,
vs.
THOMAS ST. CLAIR ET AL., RESPONDENTS. } Criminal.

Now comes the respondent, Thomas St. Clair, and makes application to this court and moves an arrest of judgment and an order that a judgment of acquittal be entered in his favor and that he be discharged from custody, and that the indictment herein be not further prosecuted for the following reasons, to wit:

1. Because the verdict found by the jury and recorded in the minutes of this court is uncertain and indefinite in this, that it is impossible to determine from said verdict of what offense the jury intended by their said verdict to find the respondent guilty, whether of murder, manslaughter, or of an assault with intent to commit murder.

2. Because he had been tried under the indictment lodged against him, and the jury which tried him has been discharged without rendering a legal verdict against him and without finding him guilty of an offense. He therefore stands acquitted of the charge.

39 3. That the jury was after being duly impannelled, sworn, and charged by the court discharged without the consent of the respondent and without any overruling necessary before rendering a valid and legal verdict against him.

4. That he has been tried by a jury; that no verdict valid in law stands against him, and that there is no judgment or order of this court existing under which he can legally be detained.

J. F. SMITH and F. J. KIERCE,
Attorneys for Respondent, Thomas St. Clair.

(Endorsed:) Filed July 6th, 1893. W. J. Costigan, clerk.

40 In the United States circuit court, northern district of California.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THOMAS ST. CLAIR ET AL., DEFENDANTS.

Bill of exceptions of defendant St. Clair.

"Be it remembered, that on Wednesday the 1st day of February A. D 1893, a day of a term of the circuit court of the United States in and for the ninth circuit and the northern district of California, commencing on the 28th day of November, 1892, an order was made and caused to be entered in said circuit court by the presiding judge thereof directing 'that a venire issue summoning fifty persons to serve as trial jurors in said court, said venire to be made returnable Tuesday, February 14th, 1893, at 11 o'clock a. m.' That thereafter pursuant to said order a venire containing fifty names drawn from the regular jury box of said court was issued by the clerk of said court and by him delivered to the United States marshal of the northern district of California, to serve and summons the persons

named therein to act as petit or trial jurors in the said court and to be in attendance thereon on the 7th day of June, 1893, at 11 o'clock a. m. That at the time of the drawing of the said names there were at least three hundred names in said jury box, but of these a portion were names remaining
41 therein after previous drawings therefrom at previous terms of said court, and the others were names placed therein by the proper officers just previous to the drawing of said venire to make the whole number of names therein up to and including the full number of three hundred names. That the said persons whose names were contained in said venire were duly summoned and on the 14th day of February, 1893, the time set for their appearance, all (except three, who had in the meantime been excused by the judge) appeared at court in obedience to the summons. That thereafter on the 2nd day of March, 1893, a day of the term of said court commencing on the 1st Monday of February, 1893, the following order was made and caused to be entered in said court: 'There being no further business to be brought before them it is ordered that the trial jury of said circuit court, for the present February term thereof be discharged and paid for their attendance.' That on the 6th day of May, 1893, the indictment charging the defendant, Thomas St. Clair, jointly with Herman Sparf and Hans Hanson, with the crime of murder on the high seas by the killing of Maurice Fitzgerald on the American bark 'Hesper,' was duly remitted to the said circuit court from the United States district court of the northern district of California, in which it had been found and presented.

"On the 29th day of May, 1893, a day of said February term after the discharge of the regular jury for the term as aforesaid, the honorable Joseph McKenna, circuit judge presiding in open court, made and caused to be entered an order directing that a venire issue summoning fifty persons to serve as trial jurors of the said circuit court, said venire to
42 be made returnable on Wednesday, June 7th, 1893. That pursuant to said last-mentioned order, a venire containing the names of fifty persons drawn from the regular jury box of said circuit court was issued by the clerk of said court and by him delivered to the said United States marshal, to summon the persons named in said venire to act as trial jurors in said circuit court and to appear thereat on the 7th day of June, 1893. That at the time of the drawing last mentioned there were at least three hundred names in said jury box, but of these a portion were names remaining therein after the last previous drawing, and the others were names placed therein by the proper officers just previous to the drawing of the said last-mentioned venire to make the whole number of names in the said jury box up to and including the full number of 300 names. That the persons whose names were contained in the last-mentioned venire (such as were summoned and not excused) appeared and attended the said circuit court in obedience to the summons of the court. That thereafter on June 14th, 1893, a day in said February term of said circuit court (the honorable Joseph McKenna, circuit judge, presiding), and the day set for the separate trial of the said defendant, Thomas St. Clair, in said court (Charles A. Garter, esq., United States attorney, appearing on behalf of the United States, and James F. Smith, esq., and F. J. Kierce, esq., appearing on behalf of the said defendant), the case of the United States against the said Thomas St. Clair was called for trial.

"The defendant, by his said attorneys, challenged and objected to the general venire and panel of jurors on the ground that the regular
43 venire of jurors for the term had been discharged and that the court had exhausted its powers to summon a jury to act during the term after the order for a jury of February 1st, 1893, and the order discharging the jury of the 2nd day of March, 1893; and on the further grounds that the statutes had not been complied with in summoning the said jurors; and that at the time of the drawing of the names of said jurors from the said jury box, the said box had not been refilled with 300 new names, but a portion of the names therein were names remaining after previous drawings.

"The court overruled defendant's said objection and denied the said challenge, to which rulings of the court the defendant duly excepted.

"Thereupon twelve persons who had been drawn and summoned as aforesaid, were regularly called into the jury box, but before being sworn to answer questions touching their qualifications, the attorneys for the defendant objected to and challenged the panel thus called on the same ground stated to the general venire. The court overruled the objection and denied the challenge, to which rulings the defendant duly excepted.

"The jurors were then sworn to answer questions touching their qualifications to serve as jurors.

"After the first juror had been examined as to his qualifications and passed by the United States and the defendant for cause, the court announced that the juror must be sworn to try the case, unless challenged by the United States or the defendant, and that this rule would be enforced as to each subsequent juror. The defendant claimed the right to examine all of the jurors as to their qualifications before exercising the
44 peremptory challenge, and excepted to the ruling announced by the court.

"Rule 63 of the said circuit court provides as follows: 'In all criminal trials the designation, impaneling, and challenging of jurors shall conform to the laws of this State existing at the time, except as otherwise provided by acts of Congress or the rules of this court; but a juror shall be challenged, or accepted and sworn, in the case as soon as his examination is completed, and before the examination of another juror.'

"The counsel for the defendant challenged each separate juror after he entered the box on the grounds that the jury had not been properly drawn as hereinbefore stated, which said challenge to each juror was denied by the court and the several rulings of the court were duly excepted to by the defendant.

"The names of jurors summoned having become exhausted, after only eight jurors had been examined, accepted, and sworn, the court ordered the marshal to summon 25 talesmen to appear in said circuit court at the hour of 10 a. m. of June 15th, 1893, to serve as trial jurors in said cause. On the 15th day of June, 1893, upon the return of the venire of talesmen by the marshal of the said district, the defendants objected to the last-mentioned venire, and to the said talesmen, and challenged the same on the same grounds offered to the original general venire or panel, which said objection and challenge were overruled by the court, to which ruling the defendant duly excepted.

"The defendant also objected and challenged the said talesmen on the ground that there was no jury regularly summoned to be filled by said talesmen, and that the talesmen had not been summoned in con-
45 formity to law. Objection overruled by the court and excepted to by the defendant.

"The defendant objected to each separate talesman, after he entered the box and was sworn, upon the same grounds last above mentioned, which objection to each juror (talesman), were by the court overruled, and said rulings were excepted to by said defendant.

"After a jury of 12 had been impaneled and sworn to try the case the following proceedings were had:

"Mr. SMITH. I now urge the same objection as urged before to the entire panel of jurors sworn to try this case.

"The COURT. The objection is overruled.

"Mr. SMITH. We except."

46 Whereupon said cause comes on for trial before honorable Joseph McKenna, United States circuit judge, when the following proceedings were had:

The opening statement was made by the United States district attorney, Chas. A. Garter, esq.

The witnesses were called and sworn and their testimony given as follows:

F. O. SODERGREN, called as a witness on behalf of the United States, was sworn and testified as follows:

I was master on the Hesper on her last voyage from Australia to Honolulu. We left Newcastle on the 22nd of December with a crew consisting of fourteen persons, being John Lucas, Morris Fitzgerlad, John Langlais, carpenter; Ah Hong, cook; M. P. Luck, steward; Thomas St. Clair, Herman Sparf, Hans Hansen, Edwin Larsen, Thomas Green, Jens Olsen, Henry Westerlind, and Pandy Secaria, as seamen, together with myself and wife. There was a dog on board the vessel. The ship's crew was divided into two watches; one called the "starboard" watch, which is the captain's watch, and the other called the "port" watch, which is the mate's watch, so that the ship can work night and day. The watches consisted of four hours at a time, with the exception of the afternoon between four and eight, which is cut up into two watches of two hours each, so that the same watch would not have the same time on deck. These watches relieve each other every four hours, and a man at the wheel strikes a bell at the time for the watch to come on deck, either at 12, 4, or 8 o'clock. A watch is always called before eight bells; that means 12 o'clock, 8 o'clock,
47 or 4 o'clock. Every half hour is one bell. The full hour will be two bells, until the eight bells go to make the four hours' watch. The seamen call each other and the officers call the officers. When one watch is performing duty on deck the other is supposed to sleep at night or in the daytime. When the vessel left Newcastle she was destined for Honolulu, Hawaiian Islands. On the 13th day of January last the starboard watch consisted of Morris Fitzgerald, the second mate; Thomas St. Clair, Herman Sparf, Hans Hansen, and Edwin Larsen. The port watch was John Lucas, first mate; Thomas Green, Jens Olsen, Henry Westerlind, and Pandy Secaria, seamen. On the night of the 13th of

January last I saw the mate about a quarter to ten standing aft on the starboard side of the wheel's box, about five or six feet from the man at the wheel, when I came on deck. Previous to that time I was in my cabin and came on deck, as usual, about a quarter to ten to take a look around. The Hesper is a bark.

The diagram shown me correctly presents the deck plan of the vessel, and was made by the man who built the ship. The poop deck is about four feet higher than the main deck, and on that night there was a deck load of coal all over the main deck. It was put on the bare deck standing about ten or twelve feet high and 2-inch plank nailed to it, and the coal was dumped on to the deck, and over that it was floored over with some hard wood that I had on top of the coal, and on top of that was a deck made of 2-inch planking; so that it was perfectly smooth, the same as it would be if there was a clear deck. That brought it about eight, perhaps sixteen inches higher than the poop deck. That had the effect of raising the deck up over the rails, and there was a special rail-
48 ing all round the deck load about three feet high. The deck load extended within three feet six of the forward house, and was separated by a small water tank and a solid bulkhead built of 5-inch planking. The forward house is divided up into the carpenter shop and the engine right in the center. The engine is used for heaving up anchors, setting sails, and discharging the cargo. The carpenter slept in this room; it is usually kept part shut and part open. There is a door from the engine room into the cook's galley. The kitchen is also here, and the cook and steward have a room here, adjoining the carpenter shop. There were two bunks on top of the other where they slept. Ah Hong was the cook and Luck the steward. In the forecastle there are eight bunks. (The witness explaining from the diagram.) There is a little square here which is marked "chain," where the ship has her chains. There is a door of entrance into the forecastle, and these little checks are all windows. This is the forehatch, and this is the original main deck. From there forward is a deck similar to the height of this deck here called the forecastle head. That was the capstan that you take a rope to and heave around. That is the ship's mainmast. Aft of that is a pair of pumps. This square is called the mainmast fife rail. It has to be kept clear at all times, no matter what load the ship carries. The hole is empty. The water is washing in there all the time at sea about a foot or more. This long ladder is the ship's gangway ladder. We use it alongside the wharf to go from the wharf to the ship, or when the ship is lying in the bay. There is a little boat that lays alongside the gangway ladder lashed to the gangway ladder. On the night of the 13th the dog was tied with
49 a chain to the dog house. At a quarter to ten of the night of the 13th of January I came on deck to take a look around before I retired. The second mate was standing on the starboard side of the wheel about six feet.

As I walked on that side of the ship towards him, he walked over to the other side of the ship and stood there. I did not say anything to him. The night was fine, the weather dark and cloudy, the vessel going about seven miles an hour. I went below, but did not go to bed. I laid on the couch in the after part of my after cabin. I had not gone to sleep yet when I heard some noise on deck similar to a shriek, twice. My wife

was preparing for bed; she was standing close to the window in our room. The window was open and so were all the doors and skylights. She called my attention to this noise. I heard two shrieks myself and concluded they were taking off some sail. I was on the point of going on deck, but being on deck so shortly before I felt sleepy and I went to sleep after I heard those two shrieks. I heard the dog bark two or three times. I went to sleep and slept until ten minutes past twelve, when the first mate came and knocked at the door and called for me. I got up and dressed, went on deck and went up on the forward end of the poop close to the deck load. I saw the mate with a bull's-eye lantern shooting the lantern in places on the deck load, searching around.

I was searching for the second mate, Morris Fitzgerald, assisted by the mate and the carpenter. After I first came up I did not go on the deck load right away, but went to the forward end of the poop. I went back again to the wheel and spoke to Edwin Larsen at the wheel. St.
50 Clair was at the wheel when I went below.

Q. Do you know how long Larsen had been at the wheel when you asked him that question?

A. He had been there from ten o'clock that evening until I asked him that question, when it was, more or less, about fifteen minutes after twelve.

Q. What happened after you asked that question of Larsen?

A. I went forward on the deck load and commenced to search for the second mate, and asked the mate if he could find him.

COUNSEL FOR THE DEFENDANT. We object to what he said to anyone unless St. Clair was present, on the ground of its immateriality and incompetency.

The COURT. Objection overruled.

(To which said ruling of the court counsel for defendant then and there duly excepted and hereby tenders this his bill of exceptions to
51 the court, to sign and seal, and the court does hereby sign and seal the same.)

A. I called to the mate to have the starboard watch come aft, which he did. They came aft—St. Clair, Herman Sparf, and Hans Hansen; Edwin Larsen belonging to that watch, was yet at the wheel. I asked if they knew what had become of the second mate. They said, "No." Herman Sparf replied that he saw the second mate go up the forerigging about 11 o'clock, but did not see him come down again. I told the men they must know where the second mate was; that they could not have been there four hours with the second mate on deck without knowing what became of him. That was the only answer I got. I went on the deck load myself, searched all over, called the carpenter to help me, got an anchor light out so that we could see better. The mate, carpenter, and myself crossed the gangway on the deck load after we came out of the carpenter shop, and we saw the furthest blood very thick, and we threw the light on it. The men were all standing around there in various places. Both watches were on the deck load with the exception of the man at the wheel. I called their attention to the blood, and said, "Men, what is this? Foul play must have been done." I asked if they saw the blood. Some said yes. I called the mate away and asked him if he had a pistol. He went down, loaded his pistol, put it in his pocket, and I did likewise. We came on deck again and looked for the body,

but could not find it. We found a trail of blood going out to the rail. We found blood on the braces under the temporary rail in two places and also on the ship's original rail outside the deck load. The starboard watch had gone below, and I told the mate to call it up again and
52 I went up with him and called the men out. The man came aft; the mate struck a match to light the lamp. St. Clair was out of his bunk—had a shirt on—and helped the mate to light it. We left the forecastle and told the men to come to the cabin, which they did with the mate, carpenter, and myself. St. Clair said nothing to me in the forecastle. They were all in their bunks when the mate called them; the place was dark, there was a lamp burning, and when we came to the door the light went out. When we got inside St. Clair assisted in lighting it. After the men came to the cabin I took a statement of each one of them, what stations they occupied in the four hours' watch from eight o'clock on that evening until midnight.

These statements were written on the official log, which I have in my possession. Edwin Larsen said that he had been at the helm from ten to twelve o'clock, and Herman Sparf said he had been on the lookout from ten to twelve. St. Clair and Hans Hansen were the two that had not anything to do excepting to be called on to do something by the second mate. They said they had been asleep on the deck load amidships right astern of the little boat, a distance of fourteen feet to the furthest end of the blood. I measured it with a two-foot rule. Still they had *had* heard nothing with the exception of once or twice, they stated, they went into the forecastle to light their pipes. Herman Sparf repeated the same to me in the cabin that he did on the deck, that he saw the second mate go up the forerigging, that he did not see the mate come down from the forerigging. All four were in the cabin at that time. They all said they could not account for the blood on the deck. I asked them if anything had carried away. They said nothing had carried away. St. Clair said that the mate may have come along, struck his head against some-
53 thing on the deck load and got up and walked overboard. One of the others said he committed suicide. I agreed with those men in everything they told me because I was scared of them. I saw blood on one of the cheeks of Herman Sparf and that made me afraid of him.

COUNSEL FOR THE DEFENDANT. I object to that as immaterial against this defendant, and I move that it be stricken out—what he said as to the condition of Herman Sparf.

The COURT. The testimony must come in at some time. I overrule the objection.

(To which said ruling of the court counsel for defendant then and there duly excepted, and tenders this his bill of exceptions to the court to sign and seal, and the court hereby does sign and seal the same.)

The WITNESS (continuing). St. Clair made another remark after that, that he had once seen a man falling, kill himself, and after a short time get up and walk fifteen feet and fall over the ship's side. I said, "That is very hard to believe or swallow, such a thing as that." I looked at the men and said, "Such a thing may have occurred; I hope you have told me the truth; I should hate very much to think I had anyone on board my ship that would have committed anything like it looks to have been done here to-night." I returned them to their beds, and they departed

to go to sleep. I told Mr. Lucas, my first officer, to call the port watch below. He called them down; one of the four being at the wheel, left three of them in the cabin, namely, Thomas Green, Jens Olsen, and Pandy Secaria. I spoke to Green first and I asked him, "what time did you come on deck to-night?" Green threw round his head, and did not
54 want to give me a straightforward answer. That was about one o'clock at night.

At four o'clock that same night the starboard watch came on deck to relieve the port watch. After I came on the deck that night I never went below but once to arm myself; the mate, carpenter, and myself kept watching on the deck until twenty minutes past four. After the port watch went to sleep, Hans Hansen being at the helm, I told Lucas to call Herman Sparf in the cabin; he came down and I told him in short words that the blood on the deck was too strong evidence to leave him loose about the deck any more, and that to protect myself against the authorities at the port of destination I must put him in irons, and I placed the handcuffs on him, and he could make no resistance. I did likewise with Thomas St. Clair, and told Edward Larsen to take the helm. Hans Hansen came to the cabin and I spoke the same words to him that I did to St. Clair and Herman Sparf, and placed the three prisoners in temporary quarters until I could have more evidence. I put them in the forward hatch, one man in the second mate's room and kept him there until daylight. At daylight I removed the three and put them down with chains bolted into the deck in the after hatch, and kept them there about four hours, while I taking affidavits from every man on the ship except these three. After this I secured the prisoners still more. Larsen told me that during the watch he was at the helm from ten to twelve. He stated that he saw the second mate go forward at twenty-eight minutes past ten. That was all he said at that time. I first discovered the blood spots about twenty minutes past twelve before I had been to the forecastle to see St. Clair, and while I was looking for the second mate. The thickest blood was about seven or eight feet
55 from the mainmast, and about thirty feet from the forward house. The thickest spot of blood which I found first was two or three feet long, perhaps two feet and a half. It was thick and curdling. We found a broom full of blood alongside the ladder. No one took any particular notice of it. The next day I saw it down by the after mainmast, lying in the water. It lay there for several days before the blood was removed. I do not know what became of it. I did not find any hair there that night, but the next morning I saw a small piece of hair stuck together with blood, and a narrow strip of scalp attached to it, right on the edge of the gangway. It was dark hair with a tinge of gray, and I would say it was the second mate's hair. I did not pay any attention to it for a couple of days. One of the seamen picked it up probably the second day. I told the mate to take care of it, and he went and looked for it and it was gone. He found Thomas Green had put it in a tin, and I told him to send Green aft with the hair, which he did. I gave the tin to the carpenter to solder the lid on to it, and I preserved it and delivered it to the marshal of this city when I came here. The identical tin was brough' by me here with the hair in it, and I delivered it to the United States marshal.

The following morning I went into the forecastle to search for revolvers and arms, and Jens Olsen pulled out a hatchet from underneath St. Clair's bunk, and he handed it to me. St. Clair did not sleep in the bottom bunk; he found it under the lower bunk on the right, down on the deck. The hatchet belonged to the Chinese cook. I gave the hatchet temporarily to the cook, and asked him if it belonged to him. He said yes. He kept it for a few days, and he came aft and wanted
56 to show me that there was blood on it. I said I could not see it. When Jens Olsen handed me the hatchet it was very greasy, and looked to me as though it had been used for cutting meat. I asked the steward if he had been chopping meat with it, and he said he never used it for anything but chopping kindling-wood. I preserved the hatchet until I came here and then handed it over to the marshal. I also found a bludgeon and piece of wood close to where the blood was on the deck-load. I took possession of it until I came here and delivered it to the marshal. It was made for exercising. It was laying about the deck close to the blood. I kept it in my possession with the hatchet, and delivered it to the marshal when I came here.

Cross-examination:

I went to my cabin about a quarter to ten. I presume I said something to my wife; I really could not say what it was. I can not tell whether I went into my private bedroom or not. I was in my room and saw the clock point to half-past ten when I came in my room and retired to the lounge. I retired immediately after coming out of my wife's room, undressed, all but my underclothing. I was not asleep when I heard the shrieks; I felt like as I wanted to go to sleep. It sounded like a human voice in distress. I told my wife it was some sailor singing out in hoisting the rigging or a sail. At the particular time when I was reclining on the sofa the sounds which I heard did not produce the impression absolutely on my mind that it was the sound of a human voice in distress; it was the subsequent events that called that matter to my attention, the loss of the mate, that made me think it was shrieks. Subsequent events
57 impressed on my mind that it must have been shrieks. I did not think that any one was in mortal distress or I should have been the first one to go on the deck to see about it. There was nothing in that sound which led me to believe that I ought to do anything as master of the vessel. I was not thinking of any trouble of any kind on board; that is why I felt so sure that there could not be anything wrong.

The distance between the mainmast and the gangway of the after cabin is about sixty-four feet. The deck load is about eighteen inches above the poop deck and about two feet over the rails. It was filled in with coal thrown in in a bulk, large and small lumps, and smoothed down as smooth as this floor with shovels. The stanchions were put up close to the rail and about seven or eight feet above the rail. The distance between that may have been six, eight, or ten feet. The surface boarding was nailed to these stanchions; the boards were placed lengthwise and crosswise with the ship. The first rails were loose and the top rails were nailed to the cross pieces. The distance between the braces varies, but as they came down they were attached to the original rail of the vessel. Some blood was found at these braces near the rail of the deck load. On

two parts of the braces below the deck load was found blood, possibly about a foot, also on the rail of the vessel. There was a clear space for a little distance forward of the braces.

The trial of said cause was here continued until Friday, June 16, 1893.

FRIDAY, *June* 16, 1893.

WITNESS (continuing): When I got out of bed at 12.20, I made this search and inquired of the starboard watch where the mate was. Sparf told me he had seen him go into the rigging. After the discovery
58 of the blood on the deck, I called the starboard watch to come down in the cabin, and afterwards ordered the port watch to be called. Thomas Green was a member of the port watch. When I called him down he turned his head about. I told him that I asked him a straight-forward question, which I expected a straightforward reply to, and he replied immediately. I afterwards came to a different conclusion concerning the conduct of Green. I afterwards put him in irons.

Two or three days after the disappearance of the mate, I discovered that Thomas Green and Edward Larsen acted very crooked. In the dead of night once Green came aft. I did not see him first. The carpenter saw him and called my attention to him. Green came on his tiptoes aft. I called out, "Who is there?" He would not answer, but come right on. When he came near I saw it was Green. I said, "Is that you Green?" He never answered, but come up to me within four or five feet on the opposite side of the wheel box. I asked him again what he wanted. He said he only wanted to see the time. I said that is all right, but you must answer when you are called to. The carpenter was with me at the time that Green was walking towards the cabin.

I called the starboard watch out of bed after discovering the blood. When the first search was made for the mate the starboard watch had not gone to the forecastle. I discovered the blood before they retired, when all hands were on deck except the cook and steward. The blood was in a pool, and from the larger pool was a track of blood as though something had been dragged over it. There was a little blood upon the deck load rail, also upon the rail of the vessel proper. The broom was
59 in the vicinity of the larger pool of blood. I did not take hold of it. I don't know if any one picked it up that night. I saw the broom there that night and a small tub with water in it alongside of it. I did not look in it. I know there was blood in it, for I saw it from a light. The water was bloody. It was of a light color, the same as any water would look with a little blood spilt in it. No one called my attention to the fact that the water in the tub was bloody that evening. I never mentioned anything about the broom or water tub that evening. Every one was standing by when I discovered the blood in the water. I cannot say that any one saw the tub with the bloody water in it or the broom that night. I only called their attention to the thick pool of blood on the deck. I did not see the tub and broom with the blood on it when I discovered the blood. I went twice to search that night. I may have gone round twenty times between the rail and the ladder, if you call that a search. I discovered the blood in the water and the broom covered with blood on a second search. If I testified that I discovered the blood on the first search, my memory must have slipped me. I found some

hair sticking to the edge of the gangway ladder next morning. I did not preserve the broom. I even did not want to preserve the hatchet and the bludgeon. About two or three days afterwards, I commenced to realize it was good to preserve all kinds of evidence to make it stronger, by probably talking to my wife about it. At first I did not believe it was necessary at all.

There was a little more blood further aft on the side of that mainmast fiferail. The night was very dark. The tub was about half full
60 of water. I cannot tell you whether it was salt or fresh. The tub was used for the dog to drink water out of. The sea was washing over that night. The deck load was wet that night at twelve o'clock. It seemed to me that when I went into the forecastle to arouse the starboard watch and have them brought to my cabin for an interview that the light went out. The light hangs about three or four feet from the door entrance of the gangway. I saw a light as we turned the corner of the house, a faint light out of the forecastle, it may have been a match; it went out. A man may have been lighting his pipe. The defendant got up in his shirt and helped the mate to light the light. The defendant had on a gray shirt. I did not see any blood on it, that is why I went into the forecastle, to discover that. I went in there to discover whether there was blood on the clothing of these men.

The witness was here withdrawn from the stand.

JOHN LUCAS, called as a witness on behalf of the United States, was sworn, and testified as follows:

I was first mate on the "Hesper" on the 13th day of January, during her voyage from Newcastle to Honolulu. I know the defendant, Thomas St. Clair. He joined the vessel at Newcastle, two days before we sailed. He was a sailor. On that night Morris Fitzgerald had charge of the starboard watch and I of the port watch. The second mate had the first watch from eight to twelve o'clock, and my watch was from twelve to four. I was called out at one bell, ten minutes to twelve, and at eight bells, twelve or four o'clock, all hands come on deck and get mus-
61 tered. Then they relieve the wheel and lookout. Herman Sparf called me. Usually the second mate calls me unless there is anything carried away aloft, or anything like that, or in the day time he might call on the steward to call me, or in the night time send some one to call me. That night Herman Sparf called me at four or five minutes to twelve. When he called me I says, "what is up?" He closed the door and run on deck. Thinking there was something carried away, I put on my clothes as quick as I could and as I was coming through the companion way, eight bells struck, or twelve, so I walked quick aft to the man at the wheel on the starbcard side and asked him where the second mate was. As I was going on the starboard side of the port watch sang out loud to me, "all on deck and relieve the wheel sir." I said, "no, where is the second mate?" I told them to look round and find him and walked forward on the forepart of the deck load and sang out two or three times. After I called out three or four times and got no answer, I went over and called the captain and told him I could not find the second mate. I went into my room, lit a bull's eye lantern, looked into the carpenter shop on the side of the house under the top gallant forecastle, and came back on

the deck load. I told the starboard watch to lay aft. The captain inquired if they knew where the second mate was, and they did not answer. Me and the captain went to the carpenter shop and roused the carpenter out. Coming out of the carpenter shop on to the deck load, and crossing from the port side to the starboard side, seeing the blood on the gangway, on the accommodation ladder and on the lashing plank underneath quite thick,
and the light went out at the time, and I sang out for the carpen-
62 ter to bring me the anchor light. I looked over again and there
was a broom on the gangway full of blood; at the end it was dripping with water. I only saw one place with blood when I was called aft. The captain called me aft and asked me if I was armed. I went below, armed myself, came on deck and took the light again and the captain and me came forward and traced the blood to the side here over the planks and on the braces on two parts and a little blood on the outside rail.

When we found the blood the second time, Pandy Secaria, Thomas Green, and Jens Olsen were there. When the blood was first found the starboard watch was standing on the weather side—some of them on the port side. After we saw this blood the captain and me went into the forecastle, and I called them out, and I could not strike a match. Thomas St. Clair got up on the bench, struck a match, and lit the lamp. Hans Hansen came up to the captain and said, "Here I am; what is this?" The captain said, "I want you men aft in the cabin." He walked aft, and they followed him shortly afterwards, and went down in the fore cabin—the four men, the carpenter, the captain and myself. When I left the watch, at eight o'clock, I saw the mate standing near the wheel. When I went away St. Clair went to relieve the wheel. The custom on the "Hesper" is two hours at the wheel, and then they relieve one another. They fix this among themselves. After we got in the cabin that night St. Clair said he was for two hours, from ten to twelve, alongside the small boat lying down sleeping. In that time he went down in the forecastle to light his pipe. He did not hear anything. When the captain asked him how he came to
account for the blood there, he answered that the second mate might
63 fall from the chain lashing, hurt himself, get up, and walk overboard. Herman Sparf said that he had seen the mate go up in the forerigging and did not see him come down. Edward Larsen said he did not see him from half-past ten that night. Hans Hansen said he was alongside the small boat from ten to twelve asleep; betwixt that time he went down to the forecastle and lit his pipe. He was asked how he could account for that blood close to him, and he answered that the second mate might have committed suicide. The captain told him to go in the forecastle and turn in, and sent me to call the port watch down in the cabin.

We were in the South Pacific Ocean, about 30 south by 160 west.

Cross-examination:

At eight o'clock, when the first watch went off duty, there was a pretty good breeze blowing from the right looking towards the bow of the vessel, we being on the starboard tack. Not very much sea was running, and it did not break over the vessel that night. The waves went over the deck load many times that night and the spray also went over it. At twelve o'clock it was dry. At twelve o'clock the deck load was dry, except the part abaft abreast of the mainmast. There was no water on deck otherwise than that.

We discovered the blood when we came out of the carpenter shop on the second search. We did not find the blood on the first search. We found the blood on the second search quite thick on the plank and afterwards discovered the spots towards the coal tub and towards the side.

64 The lashing plank lay close to the deck load and the gangway was laying right on top of the lashing plank, that is four inches thick. The blood was dripping on the sides of the gangway into the pool below; all thick.

We discovered the broom that night the first time we saw the blood. The handle of it was forward, the broom part towards the stern. I did not pick the broom up at all. I saw no one pick it up that night. I did not pick it up nor put my fingers into it. I found a piece of scalp next morning at daylight; I saw a piece of hair with something that looked like a piece of scalp on it, and there was a few hairs on the plank. The next morning the captain picked up a club that was lying alongside the coal tub; that is all we found. I could not tell if there was blood that night in the wet place upon the deck. It was wet with water. The wet place looked like water. I did not see any blood in it. I did not see any blood there next morning, although I looked.

When the watch is relieved from duty at eight o'clock it is supposed to turn in and have a sleep. The port watch that night was supposed to go to bed at eight o'clock. That was a rule of the ship. Seamen, when they are at sea, like to get as much sleep as they can. The lashing chain over this deck load is a little over half an inch. The chain-lashing goes to the mainmast. There is lots of lashing all along the deck. There is a lashing plank on the fore part of the chain which goes right across the vessel. A fellow going along there pretty rapidly would get a pretty heavy fall if he tripped any where.

Redirect examination:

65 We found blood on the first and second searches. I sent one of my men on the fore-top into the fore-rigging to see if he could see anything of the second mate. The captain was not there at that time. I went and called him. When the captain came out we searched together and then we found the blood. After I went in the cabin and armed myself we came out again and went over again and called attention to the three men in the port watch. A man who carries a light as I did in a dark night can not see much 'round him. You can only see where you throw the light. I first saw blood on the gangway, and then I saw it down on the lashing plank. When I came back onto the watch at twelve o'clock the sails had not been changed. I found the next morning the lee-fore-royal sails slacked up about a fathom. I did not hear any noise that night. I did not hear the dog bark or hear any one yell. I took a dark lantern out first, and that going out I sang out to the carpenter to give me a light. The dark lantern went all to pieces so that I could not use it any more, and I carried the anchor light after that. That was the only light that could be carried from blowing out by the wind, the only light we had in making this search. I carried it nearly all the time.

F. O. SODERGREN recalled for further cross-examination:

I feel that the defendant, Thomas St. Clair, is guilty from what I know. I can not tell you what bunk the hatchet was found under. I don't know who occupied that bunk. No punishment was inflicted on any one on board with the exception of these three men. I never took such particular notice as to examine the men's clothing when they came on deck. I know what shirt St. Clair had on when he helped the mate to light the lamp.

66 I do not know what shirt he had on prior to that time. I believe the shirt he had on the day previous was soiled; it did not appear clean.

I do not know anything about the custom of the men in the forecastle with reference to changing their clothing after they had gone to rest. There were some live animals kept on board for provisions for the captain's table. We had some chickens on leaving Newcastle; if there were any of them left I do not remember. I never saw the second mate after a quarter to ten that night.

Redirect examination:

Our voyage was fourteen days exactly after the disappearance of the mate until we arrived in Papeete, a distance of 1,100 miles, and 24 days from the time we left Newcastle, New South Wales, Australia, on the 22nd day of December, 1892. We marked every day on the chart. The track of the ship as she was going along is shown each day on the chart; counting it up until the 13th of January of this year would make it 24 days out. On that day at half past ten, 159 west longitude and 30 south latitude in the South Pacific Ocean, at the time of the disappearance of the second mate, we were in mid-ocean. The nearest land was Papeete, Tahiti, the distance from there being 1,100 miles. The nearest land was some island of the Cook Group about 600 miles. That is about mid-ocean of the Pacific Ocean. I did not observe any ships in the vicinity that night. I never saw the second mate since that night. There were no ships in the vicinity next morning. That night the sea was rough enough to wet the weather side of the ship's deck load right along. The edge of the deck load was wet next morning and that night also. The vessel is loaded very deep. The main rail would only be at the most five and a half or six feet at the extreme from the water's edge up. We

67 only had little boat in the vessel, and that was still there in the morning, and it is still on the vessel. To the best of my knowledge these two searches I have described were the only searches ever made for the second mate. That night was very dark. Every day I went by and we looked at it and talked about it. We did that until we arrived at Tahiti. The blood was stained on the braces and deck load when we got to Tahiti, and it was on the rope lashings when we reached Honolulu. The mate was about 38 years of age, in good health, five feet eight inches tall, and well proportioned. I never put him in irons or placed him in confinement on the way out.

EDWARD LARSEN, called as a witness on behalf of the United States, was sworn and testified as follows:

I was a sailor on the "Hesper" on her voyage from Newcastle to Honolulu. Morris Fitzgerald was second mate. I was on the starboard watch with the mate on the night of his disappearance. He had charge of that

watch. On that night I was at the wheel from ten o'clock. Before that Thomas St. Clair had been at the wheel and the mate was close by the wheel. After I relieved St. Clair at 10 o'clock, Herman Sparf was on the lookout and St. Clair and Hansen were on the deck. St. Clair went forward on the deck. At twenty minutes to twelve he came aft and said "Hansen wanted to take the wheel." He said, when I asked him what he wanted to take the wheel for, "That is all right," and he went forward again. I saw him at half past ten. At that time the mate was aft. St. Clair told him that something was carried away and he went forward and the mate followed him. It was very dark at the time and that is
68 the last I saw of the second mate. I did not see any more there that night during the watch. I heard a man sing out and a dog bark. I can not say exactly what kind of a noise the man made. He shouted out twice and all was quiet and I heard no more. I have never seen the second mate since. About a minute after the mate went forward with St. Clair I heard the dog bark and the man sing out. He just hollered out. At the time that St. Clair came back and told the mate that something had carried away forward I was at the wheel. The mate was talking right by. St. Clair came from the starboard side, the mate was standing abaft the poop by the bits. St. Clair had on a blue serge coat, buttoned up. Had nothing in his hand that I saw. I did not see no weapons about him. He did not make any motion or hold any particular position. I did not see St. Clair again until twenty minutes to twelve. He was coming to the wheel and said that Hansen wanted to take the wheel, as I before stated. It was my place to keep the wheel until twelve o'clock. He came on the port side, walked very easy and quick, was walking on his toes. I went forward in the forecastle after I left the wheel and saw Herman Sparf talking to the skipper as I went forward. Hans Hansen was in the forecastle at the time I came in.

Q. Did they say anything to you as you were going to bed?

A. No, sir.

Q. When you were going to bed did they say anything to you?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. Did you have any conversation with them at all?

69 A. No, sir.

Q. Had you ever heard of any plan with reference to any force to be used on any person whatever on that ship?

A. No, sir.

Q. You never had at any time?

A. No, sir.

Mr. GARTER. I am taken by surprise, if your honor please, at the answers of this witness, and I claim the right to cross-examine him for that reason.

Mr. SMITH. I shall object to any cross-examination of the witness.

The COURT. There is nothing for me to rule upon.

Mr. GARTER. I ask the privilege of cross-examining the witness on that subject. I state that I am taken by surprise by the answers of the witness, and claim the ordinary privilege of asking leading questions.

The COURT. I will hear you upon that at two o'clock.

AFTERNOON SESSION.

EDWARD LARSEN recalled:

The COURT. The objection made by counsel for the defense before the recess will be overruled.

(To which said ruling of the court counsel for the defendant then and there duly excepted and hereby tenders this bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.)

The WITNESS (continuing). After the mate had disappeared, that night, St. Clair said to Thomas Green to say nothing about it. After St. Clair, Sparf, and Hansen were placed in irons, Sparf said to me, in
70 Swedish, not to say anything about it. St. Clair was not there when Sparf told me that in the forecastle. I can not tell under what circumstances it happened. Green came into the forecastle after we turned in. St. Clair was in the forecastle, and he turned down the lamp, and he said to Green, "Say nothing about it, Tom." That is what I heard lying in my bunk just after twelve.

Q. Where you ever present before the disappearance of the second mate when the subject was discussed of taking the ship.

Mr. SMITH. We make the same objection; that it is immaterial, irrelevant, and incompetent, and also leading.

Mr. GARTER. I place that when St. Clair was present.

The COURT. The objection will be overruled.

(To which said ruling of the court counsel for the defendant then and there duly excepted, and hereby tenders this, his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.)

A. St. Clair, Hansen, and Sparf were there. Sparf said he wished the captain was killed and we would take the ship and be our own boss. This was said in the forecastle. I asked Sparf how he would kill the captain, and St. Clair said, "They don't understand the business." That is all that he said. It was on the day that the captain was arguing with the carpenter on the deck.

Cross-examination:

I was examined by the captain on that night about the disappearance of the second mate. I told him all about it.
71 I did not tell him about the proposition to kill the captain. Some days before the mate's disappearance I asked Sparf how he was to kill him. I did not attach any meaning to it; thought it was merely a joke. I never told the captain anything about it. Thomas Green and I were mates on shipboard. I never saw him before I came on the Hesper. I was friendly with him. He belonged to the port watch. He should have been on the deck when the starboard watch was turned in. He was going up on deck. The men generally go in the forecastle to light a pipe. Thomas Green came in the forecastle to light his pipe. The captain told me to tell all I knew about it, and so I did. He did not put me in irons on the Hesper, but after they were ashore in Tahiti I was put in irons. He did not put Green in irons. After I was put in jail there the captain took me before the counsel and charged me with murder, I think. He told me after he put me in jail in Tahiti that I was charged with the crime

of murder, and he then took me before the consul. The consul advised me the best way to escape the difficulty was to tell all I knew about it. I made a statement there.

Thomas Green slept under St. Clair; I slept above Jens Olsen on the starboard side of the forecastle in the top bunk, about twelve feet in. St. Clair's bunk was on the aft of the starboard side next to my bunk. It was after twelve o'clock that night that I heard the conversation between Green and St. Clair, about a quarter after twelve, I can not tell exactly the minute. I swear that the starboard watch was in the forecastle at a quarter after twelve, and it was then this conversation took place. I went in the forecastle at ten minutes past twelve from the wheel and Sparf was talking to the skipper at the time and Hansen was in the
72 forecastle, and then St. Clair came forward and they all turned in, and then Green came and turned in. Henry Westerlind relieved me from the wheel. Jens Olsen was supposed to have the lookout. This conversation was in the presence of Sparf, Green, Hansen, and St.
73 Clair. All the starboard watch had turned in except St. Clair when Green came in. All the starboard watch got relieved at a quarter past twelve, I think. Both watches were on deck looking at the blood. That was after we had been called from our beds, when the captain and the mate came in the forecastle to tell us to get up and come on deck; that is the time we examined the blood.

When the captain and mate went into the forecastle and ordered us up, they took me and the starboard watch into the captain's cabin. They took us out to look at the blood, and the captain or mate had the lamp in his hand, and they said, "There is blood here, and there must be some fould play going on." The port watch was there, except Westerlind. The captain and mate showed us the blood and they took us to the cabin. I am not mistaken about the captain and mate taking us up and showing us the blood, and then bringing us right down from where the blood was to his cabin. I did not tell the captain that I heard Thomas Green or St. Clair talking. I did not tell the captain that the mate might have committed suicide. I told the mate when he came in that the man went forward and that is the last I saw of him. I did not tell him anything about suicide. I did not see Thomas Green on the deck of the vessel after ten o'clock that night. I heard somebody cry out about half-past ten.

He was singing out. I thought there was something carried away, and when the men get in to haul in the ropes they sing out, and the men sing out like that once when the spanker was carried away. He sang out like he did that night. He hollered out twice; that is all I heard.
74 Thomas Green and I have keen kept at Alcatraz together. Sometimes we spoke about this case. We all talked over there how it happened. We spoke about it to everybody over there. I was alone with Green on the island every day. Sometimes we went up on the hill and back again. We were alone. He said something to Sparf, Hansen, and St. Clair, and said how it happened, how it was done. Sometimes Green and I used to go up on the hill every day together. Green told everybody over there how it happened, no matter who was over there; he was always talking about it to somebody. I saw the mate over there every day. I was not relcived from confinement after I made the statement before the consul at Tahiti until I got here in San Francisco. I was relieved from

confinement after I had been here awhile. I knew that a complaint and indictment had been presented against me, sworn to by the United States district attorney, charging me with the crime of murder.

The affidavit and complaint against the witness charging him with murder was here introduced in evidence and marked "defendant's Exhibit No. 1."

Redirect examination:

At the time the captain showed blood to me on the deck both watches were there. It was after I had gone to the forecastle, and after the captain had come there and called us up.

It was not long after Green came in that the captain and mate came in. I think it was ten minutes afterwards. Thomas St. Clair blew the light out after Green had gone out. The light was lit when Green was there. St. Clair turned in before the mate and captain came in the forecastle.

75 AH HONG, called as a witness for the United States, was sworn and testified as follows:

I was the cook on the "Hesper" and shipped from Port Townsend after Christmas.

Q. Were you cook the night the second mate disappeared?

A. I don't know about that. I hear—that is all. I hear mate sing out, "Ahe, ahe." I go outside, stand at the donkey door, and I say, "What's matter—what's matter?" Hansen *Hansen* say, "No matter."

Mr. SMITH. I object to that and move that it be stricken out.

The COURT. If St. Clair was not present it will be stricken out unless it be connected hereafter.

Mr. GARTER. We will prove by this witness what occurred at this time, and we prove by another witness that St. Clair was there at that time. We propose to show that St. Clair was within 15 or 20 feet, within hearing.

The COURT. Proceed; if you show he was there at the time.

Mr. SMITH. We except to the admission of any conversation had between the cook and Hansen, unless it be shown to have been in the presence or hearing of St. Clair.

The COURT. The testimony is admitted on the understanding that St. Clair's presence will be hereafter shown.

A. Hansen had his hands in his pockets and say "No matter, no matter." He was about 2 or 3 feet from me. I see St. Clair and another fellow walking off; I don't know his name. Hansen said "Nothing is the matter." I hear "Oh, oh," and the carpenter told me to go out-
76 side and see what was the matter. He came out with me. I have a hatchet on the ship. Tom St. Clair at half past six said, "Lend me axe." I saw "What you want axe for," and he say "To chop wood." The next morning the old man give me the axe. The captain say "Whose axe," and I say, "It belong to me." He say "What you know about it?" I say "St. Clair, half past six come to me and got it from me—chop wood." I did not let him have the axe. He asked me and I said, "My axe is here," and he took it himself, maybe. I sometimes cut fire wood with it; I sometimes cut meat with it. He took the axe about half past six, and the captain brought it back the next day. There was no blood

on it when he brought it back; it was just the same as before he got it. St. Clair was on the starboard side when I see Hansen about seven feet from the mainmast.

Cross-examination:

I saw St. Clair and Hansen and the other man near the mainmast on the starboard side, seven feet away from it. I was down by the donkey door. This was about eleven o'clock the time I heard this man cry out. Hansen was about two or three feet away from me; that was the first time I saw him. The coal was about seven feet high. I could not go up. I did not see Hansen before I spoke to him. I have talked to the captain about the case. I did not tell him that I saw blood on the hatchet. I did not go to the captain the next morning and say to him that there was blood on the hatchet. The captain said it was grease. I saw Hensen that night. I did not see St. Clair nor speak to him. I saw him with another fellow, I don't know his name; he is in jail.

77 THOMAS GREEN, called as a witness for the United States, was sworn, and testified as follows:

I went on board the "Hesper" at Newcastle on the 22nd of December, as an able seaman, to go to Honolulu with a cargo of coal and a cargo of sugar. Mooris Fitzgerald was second mate. I know St. Clair. I belong to the port watch and at eight o'clock I went below. Just before going below I was talking to Hansen in the forecastle head. I was on the lookout. I did not see Thomas St. Clair while I was on the lookout that night. I had no conversation at all with him.

I saw him after eight o'clock that night admidships very near the starboard side between eleven and twelve o'clock.

I saw him about the deck before that, but I never spoke to him before that time. I turned in about twenty minutes after eight. I could not tell you the exact time. I did not turn in with the rest of the port watch. I was talking to Hansen on the lookout. Only he and I were there. When I turned in Olsen, Westerlind, and Pandy Secaria were in the forecastle. I turned in and went to sleep. Herman Sparf came down in the forecastle and woke me between eleven and twelve o'clock. He said something to me but I could not make it out. He turned around and went out on deck, and when I got out, I turned around with my underclothing on. As I was turning the corner of the house going on the starboard side, I saw the man Hansen with a broom in his hand.

Mr. SMITH. We object to that and move that it be stricken out.

The COURT. I overrule the objection and deny the motion.

78 To which said ruling of the court counsel for the defendant then and there duly excepted and hereby tenders this his bill of exceptions to the court to sign and seal and the court does hereby sign and seal the same.

The WITNESS (continuing). I went on the deck-load and St. Clair, Hans Hansen, and Herman Sparf were standing there. I said to St. Clair, "What's the matter, what's the news?" St. Clair said, "We want you to give us a hand to throw the old man overboard," referring to the captain, so I says, "How are you going to get him on deck?" and he says, "One of us will let go the peak halyards and one of us will go

around to the wheel, and when he comes on deck then will be the time to do away with him." So I says, "Where's the second mate?" He says, "He has gone overboard, can't you see the blood on the deck?" I saw the blood on the deck, so St. Clair says, "What do you say?" and I says wait until I go and put a pair of pants on." I went in the forecastle and woke up Olsen and remained there until one bell, a quarter to 12. That called the watch, and at eight bells we went on deck, all hands. St. Clair and Sparf did not come there again. St. Clair said that the second mate was gone overboard, and proposed they kill the captain, and wanted me to go with him after the captain. I do not know what he wanted to do with captain. He asked me to give him a hand to throw him overboard and told how we were to get the captain on deck; I refused to go, but did not tell him I would not go because I was scared when I saw the blood on the deck and went into the forecastle. I never heard anything about this plan to kill the captain before that by any one, never had any
79 conversation with Hansen about it except on that night.

Mr. SMITH. We ask that the court make an order now that the statements taken before the consul at Tahiti of each of these witnesses, be submitted to the counsel for the defense for examination. We want to see their statements for the purpose of showing that they have made contradictory statements.

(The statements of the witnesses above referred to, taken before the consul at Tahiti, were lying on the table in front of the United States district attorney in the court room at the time the above order was asked for.)

The COURT. I don't see that I have any authority to order any testimony out of the hands of the prosecuting attorney. That is a matter for you and the district attorney to settle between yourselves. The court will make no ruling about it at all.

Mr. SMITH. We except to the refusal of the district attorney to permit us to inspect the statements in writing made by these witnesses before the consul at Tahiti.

The WITNESS (continuing). St. Clair did not tell me anything about how the mate had been thrown overboard. He simply said that he was gone overboard. I did not see St. Clair that night change his clothes at all.

I saw him have some clothes and throw some clothes overboard; just about twelve o'clock or a few minutes after eight bells, it was; we came on deck after eight bells; I passed within two feet of him. He had some clothes rolled up in a bundle and he threw them overboard in front of me; the light was lit, set on the port side of the ship. I noticed his
80 hands. There was blood on them at that time.

Cross-examination:

I was born in London, England. I took on the sea on the 25th of November, 1878. I don't know how old I was; I am now twenty-six. I was born in Dalston, London. I don't know whether I lived one year or five years there. It might be one day; I don't know anything about it. The first place I recollect living at was at a public school in Forrest Gate. I might have been six months old. I don't know how old I was, whether I was able to walk, or able to talk, or not. I stayed there until I was thirteen years of age and then I went on a training ship. I don't know whether that public school at Forrest Gate was under the patronage of the

Government. I don't know who runs it. I don't know when I went ther'. I don't know if it is a place of confinement; I don't know who took me there; I went on a training ship; I only remember my father He was in the workhouse when I went there. I don't know whether the authorities put me there or not. I was four years on the training ship and was discharged with good conduct and went to sea. I could not get off that training ship when I wanted to; not before my time was up. I was put there for destitution. After I got off there I joined a brig and sailed out to northern England. I suppose I was about 16, perhaps 17. I have been on the sea on various vessels ever since.

I saw Thomas St. Clair and the other two men on the deck of that vessel that night at eight o'clock. One had a broom with blood on it in his hands between eleven and twelve o'clock. I could not tell how
81 long it was after eleven. I had no clock nor watches. I could not go to the wheel and find out the time because it was not my business to be there. Those are the orders. I have been to the wheel many nights. I never saw the captain at the wheel. After these three men were put in iron I went to the poop deck where the captain and carpenter were, and the captain sang out to me three times, and says "Who's there? Is that you, Green?" and I went towards him on my tiptoes. I refused to answer the captain when he sang out to me and went towards him all the time. I went into the forecastle again when they proposed to me to throw the captain overboard and remained there until twelve o'clock. After coming back from seeing these men on deck I stayed in the forecastle until twelve o'clock. I did not see St. Clair in the forecastle after returning to it. I did not see him again that night after I saw him on deck with the bundle of clothes. After I saw the three men upon the deck, one of them had a bloody broom, I went back to the forecastle, and stayed from that time up to eight bells or twelve o'clock. I then left the forecastle and came out and saw Tom St. Clair with a bundle in one hand with bloody hands and that was the last time I saw St. Clair that night. I did not see him on any other occasion on that night. I am sure of it. I saw him with his bundle of clothes about to throw them into the sea. After that I saw him several times, after that, that night.

Q. Run your mind back over the whole transaction and think if you did not see St. Clair after you saw him with his bundle of clothes about to throw it into the sea; if after that time you did not see him?

A. Yes, sir; I saw him after that.

82 Q. Why didn't you say so, then?

A. I did not know where you meant. I saw him come out of the forecastle after he went below and saw him again when he came out of the captain's cabin, but did not see him any more that night. I did not have any conversation with him about what should be done in this matter. Afterwards he told me not to say anything about it, when he came out of the cabin. That night was the first time I ever heard that there was anything wrong on board. I did not tell the captain in his cabin on that very night, "Well, if you had seen the preparation they had made for three nights previous, with two revolvers and a hatchet and a deck wash bucket, standing in the accommodation gangway ladder in the deckload, to kill you and the second mate if you ventured that far forward that night." I did not say it in these words. I told the captain

that if he had seen the preparations they had been making for three nights previous. I knew something about it this night. I never heard it before him this night. On the evening that I was on the lookout Hans Hansen told me about it. This was the same night. I did not see any preparations made three nights before. I did not see a revolver and a hatchet three nights before. I did not tell the captain that night all that I told here. I told him about seeing these three men upon the deck with a bloody broom and that they had told me the mate had gone overboard, and that they wanted me to give them a hand before I appeared before the consul at Tahiti. I was imprisoned at Tahiti. I knew that a charge of murder had been preferred against me here. I wrote a letter to the prosecuting attorney about it.

83 Mr. SMITH. We call for that letter.

Mr. GARTER. I do not recollect the letter, and I do not know that I can find out; if I can I will let you have it.

The COURT. Q. You can prove what was in the letter, I suppose?

Mr. SMITH. What was in the letter?

A. I wrote to him and asked him that I wished to make a statement; that I heard a charge of murder was preferred against me, and he answered my letter.

Q. What else did you say?

A. I do not know exactly the words what was said, but that was the principal part of my doing that, because a charge of murder was preferred against me, and I asked him the reason why a charge of murder was made against me. I wanted to know why I was a prisoner.

Q. And you offered to make a statement?

A. I made a statement.

Q. And you told him in your letter that you would?

A. I told him ashore when I came up to the office. He asked me what I wanted, and I asked him the reason why I give him this statement.

Q. That you did not want the charge of murder pressed against you, and you would make this statement; is that it?

A. I wish the gentleman had the letter, for I forget what was in the letter.

Q. When you had the talk in his office you told him you wanted to make a statement and did not want this charge pressed against you?

84 A. He asked me whether I was forced to do it; whether anybody told me to do it, and I told him no; it was of my own accord.

Q. You did not want the charge pressed?

A. No, sir; I wanted to know whether I was guilty or not guilty; whether I was guilty of the crime or not. That is the reason.

Q. You asked the district attorney whether you were guilty or not?

A. I wished to make this statement to him.

Mr. GARTER. I find I have a copy of the letter here in my notes, and I shall request that the letter be read to the jury, inasmuch as it has been called for. I offer the letter to the gentleman, but he must not read anything further; it is in my notebook.

Mr. SMITH. I ask that the counsel submit to me, not only the letter written by this witness, but also his statements made in connection with it.

The COURT. The counsel offers you the letter, and that you can accept or not, but you need not look at the notes further than that.

Mr. SMITH. I simply ask that the prosecuting attorney submit to me the statement taken down in shorthand notes in connection with that letter.

The COURT. Those are private notes made in his office, and they have nothing to do with the letter. If you do not desire to accept the letter proceed with the examination.

Mr. SMITH. Under the admission of counsel, the statement was
85 taken down by a shorthand reporter in connection with this letter, and we ask that the court make an order that the district attorney permit us to inspect not only the letter, but also the shorthand statement taken down at the time.

The COURT. The letter has been offered to you. I decline to make any such order.

Mr. SMITH. We except.

(Before the cross-examination of the witness was closed the U. S. attorney made the following offer as to said letter:)

Mr. GARTER. There was something said about this letter. I again offer the letter to the attorney for the defendant to be read to the jury.

Mr. SMITH. I know nothing about what was said at the time that letter was written, and unless it is all put in I absolutely refuse to accept it.

(Subsequently, when the witness Green had been recalled and was upon the stand, the United States attorney made the following offer as to this letter and as to the statement, containing a copy of said letter, and the following proceedings took place:)

Mr. GARTER. The other day there was a demand made here by counsel, connected with the cross-examination of the witness as to an interview which occurred in my office, and as to a letter which had been written, or which the witness said he had written to the district attorney. The original not being at hand, and a copy having been taken by the shorthand reporter at the same interview, I offered to read the letter. That was declined on the ground that if the letter went in the whole statement should go in. I now propose to read that letter and afford counsel
86 an opportunity to look at the statement in its fullness, so that he may know everything that occurred at that interview.

Mr. SMITH. I object to it. My offer was declined, and we will let it stand.

Mr. GARTER. The Government not only offers counsel the language of the letter, but everything connected with it.

Mr. SMITH. I have no chance to examine it now.

Mr. GARTER. There it is [handing].

The COURT. Let us proceed with the testimony now.

The WITNESS (continuing). I retired that night a little after eight, and I went to sleep. I slept until between eleven and twelve. I don't know how long after eleven. I was awakened by Herman Sparf. He said something, but what it was I am not aware of. I went on deck because the man came and called me. I thought there must be something wrong. There must be something up, so I turned out just as I was, in my underclothing, and hurried on deck to see what was the matter.

Q. What was said that made you believe there was something wrong?

A. Because I had been called out many times when an accident, a gale, or something happened at sea. I have been called out many times to see certain things on the water, or about the stars or the moon, or something that you never see before.

Q. What was there in Sparf's conversation to lead you to believe there was something wrong?

A. I did not hear his conversation.

Q. Did you hear what he said to you?

87 A. On the deck load; yes sir.

Q. In the forecastle?

A. No, sir; I don't know what he said. He said something, but what it was I could not tell, because I was asleep—sleepy at the time.

St. Clair did not return to the forecastle from the time I saw him on the deck load with these three men with the broom up to twelve o'clock midnight. When I saw St. Clair on the port watch side he had blood on his hands. I could not exactly tell what clothes he was wearing. He had a pair of pants on and a jacket on. I don't know the color of either. I could not swear whether he had a jacket on or not. I could not swear whether he was in his shirt sleeves. I don't know what kind of a shirt he had on; whether its color was white or black. I saw no weapon there. I saw Hansen sweeping the deck with the broom on the starboard side a few feet from the mainmast. He was sweeping over the ship's side.

He was sweeping the blood off there down from amidships. There

88 was a bucket on the deck inside the accommodation ladder. I don't know how deep it was; it was not a dog's tray for water. The dog's drinking vessel was behind the boat, because I saw the dog's little kit behind the ladder. I saw that with blood and water mixed together put in the accommodation ladder the next morning at daylight. The bucket I am talking about was very dry. It did not look as though they were using it. I don't know who put the hatchet under my bunk. It was there. Olsen found it there the next morning. The captain did not.

Redirect examination:

Olsen took the hatchet from under my bunk and gave it to the captain. Hansen and I had a conversation on the forecastle head, so at the time Sparf called me at twelve o'clock I had already been told about it by Hansen.

Q. Why did you testify awhile ago that you did not know why Sparf called you?

A. Because I did not know what he said; I don't know now what he said.

Q. When you had this information from Hansen about what was to occur why didn't you go and notify the captain?

A. The reason why was I had been to sea a good long time, and I have heard the men in the forecastle say to one another about throwing one another overboard, dumping the captain, or doing away with so and so. It was an old sea yarn. And if I repeated it to the captain he would call the men aft and say to them and say: "So you are going to murder me

to-night, or to murder so and so," and the men could turn to me

89 and laugh and say, "No such thing," and make a fool of me. I considered it one of these old sea yarns. If I did not I would have warned the captain. Hansen's manner did not convince me that

there was anything of the kind about to be done. He was laughing and joking, and I thought no more about it; so I went below and turned in. I took the yarn Hansen told me for a ghost story. The second mate disappeared that night after Hansen told me the story.

JENS OLSEN, called as a witness on behalf of the United States, was sworn and testified as follows:

I got acquainted with the defendant the first day he came on board the Hesper at Newcastle on the voyage to Tahiti. I was on the ship Hesper on the 13th day of last January, the day the second mate disappeared. I belong to the port watch and turned in about eight o'clock with Thomas Green, Henry Westerlind and the Greek, Pandy Secaria. I was not with St. Clair much and was *was* never on the same watch with him. On that night my watch all turned in except Thomas Green, who came in a little after us in the forecastle. I was called at a quarter to eleven to give them a hand to throw the captain overboard.

Q. Who called you?

A. Herman Sparf.

Mr. SMITH. We object to that as immaterial, irrelevant, and incompetent, and move to strike out the answer? St Clair is in no way connected with it, and we object on the further ground that no conspiracy has been esrablished.

The COURT. I overrule the objection.

(To which said ruling of the court counsel for the defendant then and there duly excepted and hereby tenders this his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.)

A. Herman Sparf called for me to give them a hand to throw the captain overboard, and I says I would not have anything to do with it; so he told me what they were going to do with the ship and everything. They were going to take the ship and run it to the Chilean coast, take the money and everything, and take the big boat and go ashore. Herman Sparf told me that when he called me, about a quarter to eleven. I did not see St. Clair before twelve o'clock that night, when I came on deck.

When I came on deck I saw St. Clair walking on the deck load, on the starboard side just aft of the mainmast. I did not see St. Clair in the forecastle at al' that night before twelve o'clock. Herman Sparf called me and went away; and then he came back again and called Thomas Green, who got out of his bunk and walked outside of the forecastle. I did not go out.

It was probably about five or ten minutes after he called me that he came back.

Cross-examination:

When I came out of the forecastle at twelve o'clock Green and all the port watch walked out together. At twelve o'clock, when Green came out with me, St. Clair was walking on the starboard portion of the deck covered with planking. All the port watch were walking on the port side, and the other watch were all walking on the starboard side. We walked down on the port side and St. Clair on the starboard side. Green was with me at that time. We were all there.

JOHN LANGLAIS, called as a witness on behalf of the United States, was sworn, and testified as follows:

91 I am acquainted with St. Clair. He joined the Hesper at Newcastle. I was a carpenter on her on the voyage from Newcastle to Honolulu last winter. I was on her on the 13th day of last January. I was not assigned to a watch. I worked all day and slept all night, doing the repairing needed in the woodwork in the vessel. On the night, of the 13th day of January I slept in the bunk near the kitchen. Between eight and twelve o'clock that night I heard the dog bark twice and I called to the cook, "What is that," and I said, "You go out and see and call the steward;" and the cook went out there to see what the matter was and I stood a little behind him. He said, "What's the matter," and the other fellow said, "Nothing the matter; nothing the matter," and we went back to bed again. I do not know who said that. It was too dark to see. I saw three men, but I don't know which one it was. After the mate and captain called me, after twelve o'clock, I saw the blood. They told me to light the lantern and come on the deck with them.

Cross-examination:

When I heard the dog bark I went to the door of the engine room, where we pass from the kitchen right into the engine room. I could not tell who the three men were. The cook was just about a foot ahead of me. I could not see anybody at the mainmast, because the coal is a little higher than I am. I could not by any possibility see three men seven feet to the starboard of the mainmast. They were seven or eight feet aft, seven or eight feet away from me, a little to the starboard side.

I could not tell who they were. It was very dark. It may have
92 been ten or a quarter past ten in the night. There was no clock to see and it was dark. The cook did not light a light to my knowledge. I lit a light at twelve o'clock, when the captain called me, but that was after the deed was over; because he showed me the blood then. I did not light a light when I heard the dog bark, and there was no light lit either by me or the Chinaman. We did not have any light there any way handy. We could not see the hands of the clock without a light, and if we looked at the clock we could not tell the time anyhow.

Redirect examination:

The Chinaman went out ahead of me and went around to the engine room, and I followed behind him. The engine room might be fourteen feet wide by eight feet long inside. The engine is in the center, a little on the starboard side of the center. We went on the port side of the engine. The engine room is a little above the deck. The floor of the room lays on a three-inch platform above the deck. The house is built on the deck. There is a platform in the engine room and the Chinaman was on the platform, about two feet ahead of me.

The platform is about ten inches from the deck. The noise I heard was like "Oh, Oh;" that is all I heard, and I was about half asleep. I gave a statement before the Consul at Tahiti.

I was sworn.

Mr. SMITH. We ask the liberty to inspect his statement and we ask that the court rule that we be permitted to inspect that statement made before the consul.

The COURT. I make no ruling at all. That is between yourself and the district attorney.

Mr. SMITH. We take an exception.

93 SATURDAY, *June 17th*, 1893.

W. J. McCOY, called as a witness on behalf of the United States, was sworn, and testified as follows:

My official position is registry clerk of the San Francisco custom-house district. As such I have knowledge of the records of that office pertaining to the registration of vessels.

I inde'tify the original register issued to the vessel called the "Hesper." It is a document on file in my custody in the custom-house and on record at the present time.

(It was here agreed that the owners' names be taken down, and the record of the ownership of said vessel is as follows:

W. G. Hall, of San Francisco, State of California, having taken and subscribed the oath required by law, and having sworn that he is one-eighth owner together with Frank O. Sodergren, one-eighth; Robert Sudden, one-eighth; G. M. Josselyn, one-eighth; I. Burns, one-sixteenth; Mrs. Mary A. Redfield, of said place, one-eighth; Frank Hanford, of Seattle, Washington, one-eighth; Louis Poole, of Port Ludlow, one-sixteenth; John Poole, of Port Blakely, one-sixteenth, and James McCurdy, one-sixteenth, are the only owners, and bears date the 19th day of May, 1891.)

WITNESS (continuing). This is the certificate of registration of the bark "Hesper" in the custom-house here, and the registration con'inued in force until the 19th day of April of this year. I also have another certificate, issued in lieu of that to them on April 19th of this year, changing the ownership in part. The only change is that W. G. Hall sold a portion of his entry. In connection with that registration a bond is given.

94 It was sworn to by the master, and the managing owner swears that the owners herein described are citizens of the United States. The number of that record is bond 111, on page 4 of the book, and is number 533 on the back, with a printed label bearing the words "Bond and oath of registry, dated May 13th, 1891; February 14th, 1892, custom-house." I am also the custodian of that record. That bond was given before the certificate was issued. The certificate was based on that bond.

The COURT. Is not the certificate proof that all that the statute required has been carried out?

Mr. GARTER. Anticipating that some objection might be made with reference to the citizenship of the owners, as to which the registry seems to be situated, I propose to introduce the bond upon which it is based.

Mr. SMITH. It seems to me that the official certificate of the registration should set out the fact as to the citizenship of the owners. The certificate of registration is the only evidence that can be introduced on that subject unless the citizenship of the owners is proven directly.

The COURT. The certificate of registration is prima facie proof of the condition of things existing, which by a well-known rule is presumed to continue until they are shown to be discontinued. I think the certificate is prima facie evidence.

Mr. SMITH. Our objection is that it is immaterial, irrelevant, and incompetent. It does not show that it was owned wholly by American citizens, or wholly officered by American citizens, or that any naturalized citizen who may have been an owner, had not gone to a foreign country from which he had originally come and resided there a year, or resided
95 in another part of the country for more than two years.

Mr. GARTER. I think the proof is proper and necessary.

The COURT. It is not at all necessary to prove that. If you have to do it in part you have to do it in all.

Mr. GARTER. On the view that your honor takes as to the effect of the registration, I will withdraw my offer upon that.

Will it be denied in this case that the vessel carried the American flag?

Mr. SMITH. I do not know that that cuts any figure in it.

Mr. GARTER. I think it does, and I will call a witness to prove it.

F. O. SODERGREN, recalled as a witness on behalf of the United States, testified as follows:

Mr. GARTER. Q. During the voyage that you were on, what flag did the "Hesper" carry?

Mr. SMITH. Objected to as immaterial, irrelevant, and incompetent.

The COURT. Objection overruled.

(To which said ruling of the court counsel for the defendant then and there duly excepted, and hereby tenders this, his bill of exceptions, to the court to sign and seal, and the court does hereby sign and seal the same.)

A. The American flag.

Cross-examination:

I am a naturalized citizen.

Mrs. F. O. SODERGREN, called as a witness on behalf of the United States, was sworn and testified as follows:

96 I am the wife of Captain Sodergren of the Hesper and was on board the Hesper on the 13th day of last January during her voyage from Newcastle to Honolulu. On that night between the hours of eight and twelve o'clock I was down in the cabin.

Between ten and half past ten I was preparing for bed in my bedroom and the captain was in the stateroom or cabin. I heard voices in the afterpart of the ship, but being very light I paid no attention to them. A second or two afterwards I saw the steps of two men passing the side window and in a second after that I heard two shrieks; one was loud, the second a little bit lighter, and the dog barked. I prepared my bed and went to sleep. I think the shrieks were about half past ten; just the minute I can not say. I heard this noise a second or two after I saw the men passing the window. Everything was done so quick that I did not think it could have been more than a second or two. I recognized the voice. It sounded like the second mate's voice, and the dog barking drew my attention to it more than anything else. All noise ceased immediately after that; then I retired.

Cross-examination:

My husband retired as soon as I did, only he was in the cabin on the lounge. He was just going to retire. I asked him to go up and see what

it was. He informed me that the sails were being pulled down. He thought that the sailors were pulling down sails. I then retired but would not if I had heard any more noises. I listened at the window but everything was quiet instantly.

97 PANDY SECARIA, called as a witness on behalf of the United States, was sworn and testified as follows:

I have been a sailor on the bark "Hesper," which left Newcastle on the 22nd of November last. I was on her on the 13th of January last and belonged to the port watch. At ten o'clock that night I was sleeping in the forecastle. I turned in about nine o'clock. Thomas St. Clair was at the wheel that night.

When I turned in Westerlind was in the forecastle. Olsen and Green were standing talking in the lower deck. At nine o'clock they came in and said, "You fellows not dead." "What time is it?" I say; they say "nine," and they turned in that time and sleep. I went right to sleep. At ten minutes to twelve Hans Hansen came in and called the watch. I was asleep, and he said, "One bell, boys; we lost the second mate to-night." When it struck eight bells I went on deck. The first man I saw was Lucas. St. Clair was standing in the weather side. I saw the mate and heard him say, "Where is the second mate?" No one answered him. Herman Sparf said, "I saw him going aloft in the forward mast about half an hour ago. The mate say, "You fellows, some of you see for the mate." I went forward and said, "I no can find him." He said "You go aloft." I went up and sang out, "Second mate, second mate;" no one hear me and I come down and said I no can find him. At that time I saw the mate had a little light and I saw the blood and I go aft after the captain. He came on deck, called the carpenter and told him to light the big lamp. All were standing there. I saw the blood. There was blood all over the deck and the sea washed over the blood. I saw a little skin from the hair, and on two spots, I think, some brains, and next day Green got it.

98 They must have killed two cows; too much blood. St. Clair, Sparf, and Hansen were ont he starboard side. After that I go and light my pipe in the forecastle. They always leave a little light there, but it had been blown out, and I go inside the forecastle and Herman Sparf said to me, "Who is that?" I said "It is me." When I went to the forecastle I saw St. Clair. He come from the forecastle and had changed his clothes. He had got a shirt on and no pants. He jumped inside the forecastle and I run aft. He had a bundle of clothes in his hand and he chucked them overboard. The captain called me aft. He called St. Clair, Sparf, and Hansen, and the man at the wheel, Larsen. I was scared and I got my blanket and wrapped it round me three times for fear some one would shoot me. The captain called them aft to put them in irons, and Mr. Lucas put Westerlind and Green in the starboard watch and leave me and Olsen in the port watch. The day after the mate disappeared he put them in irons. I never saw any pistol on board. I saw a broom that night and I take the broom myself and give it to the mate.

The captain said to keep it, but after I take the broom and give it to the mate. The captain says "Keep it, this broom."

Cross-examination:

The weather was beautiful, the ship running five or six knots, fine weather. Sometimes it came squalls and after that there would be no wind. Fine weather I think this night. Sometimes it was squally and big seas come over the rails and washed over the blood. Sometimes plenty of seas come over the deck load. Heavy squalls and heavy seas came up. About eight o'clock I went into the forecastle. At nine
99 o'clock I went to sleep. I woke up at ten minutes to twelve and got up then. We all went out of the forecastle together, Olsen, Westerlind, Green, and myself, and walked around on the port side of the vessel. The whole watch walked on the port side of the vessel. At that time St. Clair was walking on the starboard side. I did not go back to the forecastle after I came out of it that night. I don't know anything about whether any one blew out the light in the forecastle that night or not. I went in there to light my pipe. I did not see anyone blow it out. The captain and the mate were on the deck searching for the second mate about half an hour. I came on deck at twelve o'clock with the port watch. When I go to light my pipe I came from the forecastle and saw St. Clair outside and saw him chuck some clothes overboard. That was while the captain and the mate and the starboard watch and the port watch were on deck all searching. It was about half past twelve when I saw St. Clair throw the clothes overboard. The first thing I saw after I came out of the forecastle with the port watch was St. Clair walking up and down the starboard side of the vessel.

I saw the mate searching for the second mate and no one answered hom when he cried out. "Where is the second mate?" That night I was scared for my life because I heard lots of times that they were going to kill me. Lots of times I heard Larsen say they were going to kill me. The mate sent me in the forerigging on the starboard side. After I came down from the forerigging the mate got a light, and I called the captain, and he called the carpenter. I stood on the lee side. During the time the search was made, and after the blood was seen, I
100 stood on the port side with the rest of my watch and the other fellows were standing on the starboard side. They went below that night into the forecastle. Since I left Tahiti I have not talked with Green. I am scared of him. The captain called me into his cabin that night with the watch and Green and Olsen. I did not tell the captain anything; I did not know anything; I saw St. Clair throw the bundle of clothes overboard before the port watch went into the captain's cabin.

Q. You have a good deal of feeling against St. Clair, have you not? You don't like him?

A. I don't like him because he promised to kill me for nothing. I hear of this.

Q. You have heard that St. Clair was going to kill you?

A. Yes, sir; these fellows told me.

Q. Who told you?

A. Green told me and Olsen told me.

Q. Green and Olsen told you St. Clair was going to kill you?

A. Yes, sir.

Q. Did Larsen tell you St. Clair was going to kill you?

A. Yes, sir.

Q. They told you that St. Clair was going to kill you?
A. They told me after they came on deck next day.
Q. The next day after this affair Green, Olsen, and Larsen told you St. Clair was going to shoot and kill you?
A. Yes, sir; Green told me and Olsen told me.

HENRY WESTERLIND, called as a witness on behalf of the United States, was sworn and testified as follows:

101 I got acquainted with St. Clair on the bark "Hesper" when she was going to Honolulu. I was on board her on the 13th of January last. I belong to the port watch and left the deck that night at eight o'clock with Pandy Secaria. He and I were first in the forecastle, and a little while afterwards Olsen came in. Green came in afterwards, about half-past eight, I think. I was just ready to go to sleep and I heard Olsen and Thomas Green talking about half-past nine. I then went to sleep. The first I heard was Hans Hansen come in and sing out one bell. Hans Hansen came in the forecastle and Herman Sparf was standing by the forecastle door and looked inside. Hans Hansen was the first one I saw after I woke up. At that time Thomas Green was in his bunk. He got up, put his clothes on and went out. He did not go out before we went out together at twelve o'clock. At that time I saw St. Clair, Herman Sparf, and Hans Hansen standing amidships on the starboard side by the mainmast. It was a dark night and I couldn't see them. They were walking up and down and sometimes standing and were talking. I could not hear what they said. I did not hear St. Clair say anything. I saw blood on the starboard side that night about six or seven feet from the mainmast. I was not at the wheel that night; Ben. Secaria was there. Thomas Green was on the lookout when I turned in at eight o'clock.

Cross-examination:

When the port watch comes on duty and before it relieves the starboard watch it stays on the port side of the vessel until it relieves that watch. That night was a very dark one, so dark that I could not see a difference in a man's face. I could not see how many there were. If a man was
102 standing within twelve feet of me I could see it was a man, but unless I knew a particular man ought to be standing there I wouldn't know who it was.

M. P. LUCK, called as a witness on behalf of the United States, was sworn and testified as follows:

I know the defendant St. Clair. I first saw him in Newcastle. I only spoke to him two or three times aboard the "Hester" on the voyage to Honolulu. I was steward on board the "Hesper." I was there on the 13th of January last.

I know very little about what occurred that night between eight and twelve o'clock because I was asleep at that time. The only thing I know about it was when the carpenter called me out for the cook; I woke up; heard a big Newfoundland dog on board barking two or three times. A half moment after the dog barked there was a kind of "hey, hey." I heard an exclamation, but I could not tell whether it was a human voice or not. I was in my bunk on the starboard side alongside of the galleys

close to the third window from the main deck. I did not get up at all. I never had any conversation with Thomas St. Clair in reference to this matter at any time or place.

MONDAY, *June 19th*, 1893.

ARTHUR PRICE, called as a witness on behalf of the United States, was sworn and testified as follows:

I am an analytical chemist and assayist, and reside in the city and county of San Francisco. I am a son of Thomas Price, and junior member of the firm of Thomas Price & Son. The tin can now presented to me was brought to me in a sealed condition last Wednesday or Thursday by Mr. Long, United States marshal.

103 I opened the can and found it to contain some hair which is now in the can. Mr. Long, at the same time that he brought me the tin can, brought me a hatchet and a club or belaying pin.

These things have been in my possession locked in my safe ever since, except at the time I handed them to my father for examination. They were submitted by my father to an analytical test. (The said articles were here introduced into evidence marked United States Exhibits "*B*," "C," and "D.") Prior to their introduction in evidence, the same were objected to by the counsel for the defendant upon the ground that they had not been connected with the defendant.

As to the identity of the hatchet, club, and tin can and contents, while the witness, Arthur Price, was on the stand, the following proceedings were had:

Mr. GARTER. I think from what was suggested to me by Mr. Smith, before I placed the witness upon the stand, that it will be admitted that the club and the hatchet are the club and hatchet concerning which the captain testified upon his examination.

Mr. SMITH. Those were the ones that were on shipboard.

Mr. GARTER. The ones that the captain testified to, to finding and as being the ones that were delivered to him, and by him delivered to Mr. Long, the United States marshal.

Mr. SMITH. We make no contention about that.

Mr. GARTER. And you make no contention about these being the same ones that were delivered by Mr. Long, the United States marshal, to Mr. Price?

Mr. SMITH. No, sir.

104 Mr. GARTER. I ask leave to introduce these in evidence.

Mr. SMITH. We make the objection that they are not connected with the defendant.

Mr. GARTER. Will it also be admitted that the article contained in this tin can is the article about which Captain Sodergren testified that he delivered to the United States marshal?

Mr. SMITH. Yes, only we make the general objection that it is not connected with the defendant.

The articles, to wit, the said club, hatchet, tin-can, and contents were then admitted in evidence.

No exception was taken to the ruling of the court admitting this evidence.

THOMAS PRICE, called as a witness for the United States, was sworn, and testified as follows:

I am by occupation an analytical chemist, and have been so engaged all my lifetime. I am 57 years of age. I have been connected with analytical chemistry as an analytical chemist ever since the year 1859. Previous to that my education would go back four or five years to a place at Swansea where I was engaged as professor of chemistry, and had the preparation of students to pass the preliminary examination or entry into the Royal Colledge of Surgeons for their degree. In 1862 I arrived in this country and engaged in the profession of analytical chemistry. In 1864 or 5 I was elected professor of chemistry at the then Toland Medical College; afterwards I joined the faculty of the medical department of the University of the Pacific and continued there for several years and have since been engaged continuously in the business of analytical chem-
105 ist, having made a large number of examinations for poisons of all kinds, several investigations as to the character of blood before the courts, more especially an important murder case in Martinez in 1868.

I am continually, now, in the examinations of products given me by physicians to find blood. I have made several inve-tigations at different times as to the characteristics of the hair of different animals, as well as of the blood. I have examined the *the* articles contained in this tin box already introduced in evidence. First, the hair itself, and placed it under the microscope and it had all the characteristics of human hair. The appearances, generally, when you place it under the microscope with about four or five hundred diameters, are like a tube with a slight fuzz on the outside, and following then with little dark lines, in the center perfectly light, on account of the hair being a tube. I saw that it was human hair, and there are traces of blood in it, and when it was given to me it was all matted together. From the characteristics of the blood I found there I would say that it is the blood of a mam'alian; that is the blood of an animal that feeds its young at the breast. First of all, I would say that blood when placed under the microscope under the higher power, that it is seen there as mammalian blood in rounded discs. When separated and isolated, they look like rounded pellicles with the light center in it as if it were a depression. These corpuscles are of different sizes, depending upon the kind of animal which has produced the blood. The corpuscles of human blood varies from $\frac{1}{2800}$ of an inch to $\frac{1}{4000}$ of an inch, the average being $\frac{1}{3200}$. There are animals, also, which have blood corre-
106 sponding pretty close to that; for instance, blood of a monkey and ape is $\frac{1}{3360}$; the average blood of a bear is $\frac{1}{3700}$; that of a pig, $\frac{1}{4200}$; that of a horse, $\frac{1}{4600}$; that of an ox varies from $\frac{1}{4567}$ to $\frac{1}{4671}$; the average of blood of a rat is $\frac{1}{3600}$ of an inch.

This blood may be, on account of the variation of the size, the blood of a monkey or of a bear, but it can not be the blood of a pig, horse, or ox. It may be that of a rat, monkey, or bear, but not of a chicken, fowl, or birds. There is a great deal of muscular matter found in the tin box. It would not all dissolve in my solution. When I placed it under my microscope it look like pieces of flesh. There is nothing very distinctive about that, because the quantity is so small, but it looked like flesh that would not break up. I found traces of blood on the hatchet and also on the sides where the black spots are. There did not seem to be any on the

sharp edge. There is a clot upon it and a piece of flesh and muscular matter. The blood upon the hatchet has the same characteristics as the one already compared. There was hair upon it which I found to be identical in color, size, and diameter with that which I took out of the box. I would say that it was the hair of a human being, and the same person as that contained in the box. I found several points upon the club which contained blood, but it had matted into solid matter. I also found some hair entangled with some other blood. It was of the same quality as that I found on the hatchet and in the box.

Cross-examination:

I commenced working upon these articles when they were
107 handed to me last Saturday evening after six o'clock. I worked all day Sunday, and this morning I examined the hatchet first.

The examination was conducted first with a strong magnifying-glass in my hand to try and locate the clots of blood if I could. I had been told to examine the hatchet for blood, not for clots of blood. I had no information that some one was killed until I read it in the newspaper after I commenced working. I knew nothing about this case until Saturday or Sunday.

I read the newspapers. I first made a chemical examination of the hatchet. The clot which was on it has gone. There is some blood still on the hatchet. I can not discern any blood upon the hatchet with the glass I am using. It might be the dark spots upon the hatchet might be a mixture of blood and rust. When a drop of blood falls on an iron surface it produces an oxidation. The blood would remain upon the hatchet when it was varnished. The blood would have remained on it if it was greased. I could possibly pick some hair off the hatchet yet. I scraped off some old spots upon the hatchet and divided them into two parts. The quantity was very small.

The first part I dissolved in water, adding a very little quantity of weak ammonia. Then I took that solution and added more ammonia and it came out a dark color, the tests indicatively of blood. As a second test, I heated it up to a temperature of 140 ° degrees Fahrenheit and it coagulated. I took a small quantity of it and added a little nitrate acid and it coagulated because it contained albumen. I t'en added another portion and added a drop of nutgall and it produced the characteristic red
108 color. The character combination that it produced has never been known, but it does produce it with all kinds of blood, irrespective of animals, fowl, or fish. The dark color which is produced by the animal test is not the characteristic of any particular class or kind, but of blood in general. I took the other portion already described digested it with water containing one-seventh of its volume of glycerine, allowed them to remain twenty-four hours so as to soften and get the blood in solution, and took the solution and placed it under the microscope, just about a drop. I left that to soak for twenty-four hours, and after that I put my glass over it and put it on my slide under the microscope and found the blood corpuscles. I have not got the slide any longer.

The corpuscles dry up upon exposure. Possibly in an hour they will dry. I washed the slide with which I tried the tests. I had two slides for the blood on the bludgeon, the blood on the hatchet, and the blood on

the hair. I will not say that it is the blo'd of a human being, but I will say that it is the blood of a mammalian. I measured the corpuscles of blood with micrometer.

F. O. SODERGREN recalled as a witness on behalf of the United States.

San Francisco was the first American port into which I took the vessel, the Hesper, after the occurrences of the night of January 13th last. I put the prisoners in irons. I left them on board of ship two weeks; had them in irons. When I put into Tahiti I gave them to the United States consul there. I left them there. After leaving them in Tahiti I went with my vessel to Honolulu, Hawaiian Islands. The distance from
109 Tahiti is 240° degrees, or 2,500 miles in a straight line. It takes seventeen days to go there. From Hon'lulu I went to San Francisco, and that took nineteen days and a half. During all this time I heard nothing of the second mate.

Q. During the voyage and particularly on the night of the occurrence of the 13th of January, and for several days prior to that and afterwards, I wish you would explain to the jury whether there was much shipping in sight or whether there were many vessels that you came in contact with.

Mr. SMITH. I object to the question as irrelevant, immaterial, and incompetent unless it is brought to the particular period of time of this alleged occurrence.

Mr. GARTER. From the 13th of Janu'ry, or a few days prior to that, and a few days afterwards.

The COURT. He has already testified that there was no shipping in sight at sundown that night and none in sight the next morning. I overrule the objection.

(To which said ruling of the court counsel for the defendant then and there duly excepted and hereby tenders this its bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.)

A. I saw no shipping whatever.

The WITNESS (continuing). During all the voyage from Newcastle to Tahiti I saw no vessels except the Hesper, the one I was on. Upon that night the door between the after and the forward cabin was closed; locked with a common lock.

Cross-examination:

110 During the confinement of these people I kept St. Clair apart from everyone else in confinement. I had nothing to do with them after the United States consul came on board at Tahiti and took the three men ashore. I don't know anything about how they were kept in Tahiti. On board the ship, after the first four or five hours I kept St. Clair isolated from the rest of them; kept him separate. When I arrived in Honolulu I went ashore. The American flag was flying then in some parts of the town. I believe it was flying on the executive or government building.

THOMAS GREEN, recalled as a witness on behalf of the United States, testified as follows:

The first port we put into after the night of the 13th of January last was Tahiti. Sparf, Hansen, and St. Clair were with me. I remained at

Tahiti seventeen days. Sparf, Hansen, and St. Clair were there eighteen days. I left Tahiti upon the Tropic Bird. St. Clair, Saprf, and Hansen came away with me on the Tropic Bird to San Francisco, California. After the night of the 13th of January, the only port we were in until we got to San Francisco, was Tahiti. St. Clair was on the same ship and was in Tahiti with me. The ship did not put into any other port. She came right to San Francisco. I found a piece of hair on the Hesper within a day or two after the 13th of January on the side of the gangway ladder. I put it into an empty tobacco tin that was in my berth. and the captain one day asked me for the tin and said, says he, "Do you want it;" I says, "No; I don't want it." He says, "Will you give it to me?" I says, "Yes, sir," so I gave the tin to the captain. I took the hair away from the gangway ladder the next morning I believe.

111 When I came on deck that night, after being called out of my berth, St. Clair was the first man that spoke to me on the deck, and he says to me, "Will you give us a hand to throw the old man overboard," meaning the captain. I says, "How are you going to get him on deck?" He says, "One of us will go to the wheel and another man let go of the peak halyards, and when he comes on deck then it is our time to do away with him," so I asked him where the second mate was, "Oh," he says, "we killed him and threw him overboard."

Cross-examination:

I was confined in the jail in Tahiti by myself. When I was taken on the "Tropic Bird" I was placed in a house on deck made purposely for the prisoners. Herman Sparf, Hans Hansen, Edwin Larsen, and myself were together. We did not go into Honolulu, and we did not go into any other port until we came to San Francisco. We reached here in the day time. I did not stay up all night on the "Tropic Bird." We never went outside of the house for thirty-two days, and I never saw a clock. I don't know what time I went to bed. I would know if the ship touched at any port while I was in bed. The captain would not come and wake me up to announce that fact. The only way I would have known whether we touched any other port actually at night or not would be by having a conversation with the crew.

Q. Do you swear now that you testified upon the stand the other day that St. Clair said, "We have killed the mate?"

A. Yes, sir.

Q. You testified to that the other day?

112 A. I do so now.

Q. Do you swear that you testified that way the other day? Why don't you look at me; are you scared to look a man in the face?

A. No; not a bit.

Q. Did you testify that way the other day?

A. I don't know whether I did or not.

Q. Have you had any interview with the district attorney since you left the stand?

A. No, sir.

Q. How did he know that you wanted to amend your statement?

A. I don't know, I am sure.

Q. He guessed it, I suppose?

A. I don't know.

Q. Did you not tell the district attorney that you wanted to amend your statement in regard to what St. Clair, Hansen, and Herman Sparf had told you on the deck that night that they had killed the mate?

A. That they had killed the second mate.

Q. Did you tell the district attorney that you wanted to amend your statement in that regard?

A. No; not in that regard at all.

Q. In what regard did you tell him that you wanted to amend it.

A. He asked my reason why I wanted to make a statement. I told him that I was put down as a prisoner, and I wished to go before the grand jury to testify that I am not a prisoner.

113 Q. I am not asking about that at all. You came on the stand the other day and told the jury and the court about an interview you had with St. Clair, Hansen, and Sparf on the deck between eleven and twelve o'clock at night on January 13th. You said on that night you went on the deck in this testimony that you gave and you said to St. Clair, "Where is your second mate?" and St. Clair said, "He has gone overboard." You did not say anything in that testimony about St. Clair and the other people telling you they had killed him. You come on the stand now and testify that St. Clair, Hansen, and Sparf told you that they had killed the mate.

A. They did not. St. Clair was the only man that ever spoke to me about it.

Q. St. Clair told you that he had killed him?

A. Yes, sir.

Q. Why did you not testify that way the other day?

A. There was a great misunderstanding in the statements, I suppose.

Q. How is it that you come in and testify to that to-day, that St. Clair told you he had killed the mate instead of saying that the mate had gone overboard?

A. Testified that he had killed him?

Q. The other day you said that St. Clair told you that the mate had gone overboard; to-day you say that St. Clair told you that he had killed the mate?

A. Did I make that statement in this court that he threw him overboard?

Q. Yes; that is what you said.

114 A. Now I make the statement this morning that he told me he killed him and threw him overboard.

Q. Yes, that is the statement you make this morning, which is a great deal harder. What is the reason for that?

A. I don't know. I cannot see the reason in it.

Q. Did you tell the district attorney that you wanted to say on the stand that what St. Clair told you was that he had killed the mate?

A. He said it was in the evidence.

Q. And then you come in here and testify to it so as to make it come out all right?

A. He says I gave it that way.

Q. After you left the stand the other day the district attorney said to you that the statement you made in Honolulu or Tahiti was that St. Clair told you that he had killed the mate, and now you come into court——

A. Yes, but I was not sworn down in Tahiti. There are a good many things that ought to be there more than what there are there.

Q. There are a good many things in the statement in Tahiti that ought not to be there at all. You did not swear to it?

A. I did not. I don't know that I am bound by it.

Q. Did you tell Edward J. Livernash, in this city and county, soon after you' arrival here, in the presence of Edward J. Livernash and yourself, that the second mate was a brute?

A. I said so?

Q. Yes.

A. How could I tell him?

115 Q. I ask you whether you said so or not to him.

A. No; I did not.

Q. You never told him that?

A. No.

Q. That the second mate was a dammed brute?

A. No; I did not.

Q. And that he had been kicking the men out of the riggin'?

A. No; I did not.

The WITNESS. I was over in Alameda County jail for fourteen days. I was taken out of the Alameda County jail and brought to Alcatraz Island as a witness. I was taken before the grand jury before I went to to Alcatraz and then I was taken to Alcatraz Island.

Q. Did you say to the other prisoners in the Alameda County jail at the time you were in, whose names are unknown either to the defendant or or his counsel, that you were going to do your best to get St. Clair hung?

(Mr. Garter objects on the ground that the question is not specific as to time, place, circumstance, and persons present.)

(Objection overruled.)

Mr. SMITH. Why do you hesitate?

A. Try to get him hung? May I speak upon the subject?

Q. Answer the question. Did you say so?

A. Yes, sir; I did.

Redirect examination:

Mr. GARTER. Q. This morning you came into court. I will ask you if you had a conversation with me about your evidence given the other day standing right here in this court room?

A. Yes, sir; I believe we were talking here. You called my

116 attention to that matter and you asked me "Did you not say that St. Clair said 'I have killed him and threw him overboard.'"

You asked me if that was it. You said, "It is in your evidence so." I mean the evidence that I took an oath to in before the grand jury and to you in your office previous to that time. That occurred just before I went on the stand and after I was brought in the room here.

Mr. SMITH. Q. The Tahiti statement did not contain anything of that kind, but the grand jury statement did?

A. It stated more in Tahiti than what it has got there.

Q. You did not tell as much before the grand jury?

A. I told them everything I knew about it, but it was not taken down.

Q. You told the grand jury everything that you knew about it. Is that so?

A. What I heard, what I saw, and what I know.

Q. You told everything to the grand jury?

A. I believe I did.

Q. But you told more in Tahiti?

A. Certainly, because the consul listened to me.

Q. You were telling in Tahiti things that did not occur in Tahiti. You told more than you told the grand jury?

A. I told all I knew about it.

The WITNESS (continuing). Only a few questions were put to me in Tahiti. The consul asked me to make a statement and I told him the whole business. I made a statement before the grand jury and they cross-examined me and they were satisfied. I was cross-questioned both by the district attorney and the grand jury. There never has been any
117 promises made to me that I would not be prosecuted for murder or any other crime.

I was taken out of the Alameda County jail after I had been taken before the grand jury and put on the island as a witness.

JENS OLSEN, recalled as a witness on behalf of the United States, testified as follows:

I saw St. Clair with a revolver in the same week before the second mate disappeared. I do not know of any other person having one. He did not state where he got it.

Q. That night, at the time you say that Herman Sparf and Hans Hansen came to the forecastle, I would ask you whether either Herman Sparf or Hans Hansen said anything to you, or had any conversation with you, and to relate what that conversation was.

Mr. SMITH. Objected to as immaterial, irrelevant, and incompetent.

The COURT. What time was this?

Mr. GARTER. At the time that the witness states that Hans Hansen and Herman Sparf came to the forecastle and woke him up.

Mr. SMITH. I object to any conversation at that time on the ground that it is immaterial. It is the same objection that was made the other day on which your honor ruled, and excluded this very testimony.

The COURT. This question was reserved for argument and has not again been presented.

Mr. KIERCE. I make the further objection in the absence of the proving of the conspiracy. The testimony must be ruled out.

118 The COURT. I think the testimony is admissable. The objection is overruled.

(To which said ruling of the court counsel for the defendant then and there duly excepted, and hereby tenders this his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.)

The COURT. The jury will remember that I do not pass on the probative force of the testimony at all. It is ultimately for them to decide.

A. It was only that Herman Sparf came down to me and called me at that time, quarter to eleven, I believe it was, and he asked me if I would give him a hand to throw the captain overboard. He told me what they were going to do with the ship; to do away with the captain and take charge of the ship to run for the Chilean coast and take everything on board, all the money. He said nothing more to me. I told him I would

not have anything to do with it, so he went out of the forecastle. Then he came in in about five or ten minutes and called Thomas Green, and he went out in his drawers. He did not say anything about the second mate at that time. I was lying in my bunk until quarter to twelve, one bell, then I turned out, put on my clothing, and went on deck at eight bells.

Cross-examination:

Herman Sparf awakened me at a quarter or ten minutes of eleven, as near as I can guess. It is not true that Thomas Green came back and waked me up, after he went out in his drawers and came back. I was awake all the time. I cannot tell how long this conversation with Sparf was taking place. Westerlind was lying in his bunk and Pandy Secaria and Thomas Green were there.

119 EDWARD J. LIVERNASH, called as a witness on behalf of defendant, was sworn, and testified as follows:

I am a reporter on the "Daily Examiner," a newspaper published in the city and county of San Francisco. I saw Thomas Green in this building after he was brought here upon the "Tropic Bird," and he stated to me that the mate, Morris Fitzgerald, was a brute.

The testimony in the case here closed and the foregoing constitutes all the testimony introduced in the case.

After argument by the respective counsel the court proceeded to charge the jury on Tuesday, the 20th day of June, 1893.

Prior to said charge and to the argument of counsel counsel for defendant submitted to the court and requested the court to give to the jury the following written instruction:

"Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. The jury are instructed that under the indictment in this case the defendant, St. Clair, may be found guilty of manslaughter, and if, after a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendant is guilty of manslaughter you may so find your verdict."

Which said instruction the court then and there refused to give as requested, but to which said ruling of the court defendant did not at said time except.

The court then charged the jury. The said charge, being in full in the judgment roll, is hereby expressly referred to and made a part of this bill of exceptions.

120 No exception was taken to the charge of the judge to the jury or any portion thereof at the time of said charge, or before or thereafter.

After the court had instructed the jury as aforesaid they retired to deliberate upon their verdict.

Subsequently on the same day the jury returned into court, when the following proceedings were had, the defendant and his counsel being present.

The names of the jurors were called by the clerk and all answered present. Thereupon the clerk said: "Gentlemen of the jury, have you agreed upon a verdict?" To which the jury, through their foreman, answered "We have."

CLERK. Gentlemen of the jury, please rise. Prisoner, please rise. Gentlemen of the jury, look upon the prisoner. Prisoner, look upon the jury. Gentlemen of the jury, what say you; is the prisoner guilty or not guilty?

FOREMAN OF THE JURY. Guilty.

Thereupon, in addition to the foregoing, at the same time and place delivered to the clerk of the court a written verdict, as follows, to wit:

"We, the jury, find Thomas St. Clair, the prisoner at the bar, guilty.

Foreman,

FREDERICK SELLER.

To which said verdict counsel for the defendant then and there duly excepted, and hereby tenders this his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.

121 Thereupon the court made the following order: "It is ordered that sentence be pronounced on Thursday, July 6th, 1893."

Thereafter, to wit, on the 6th day of July, 1893, pursuant to said order, the defendant was brought into court for sentence.

Prior to sentence the said defendant moved the court for a new trial of said cause, which said motion was by the court denied.

To which said ruling of the court counsel for the defendant then and there duly excepted, and hereby tenders this his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.

Said motion was not made upon any agreed statement or upon any bill of exceptions or minutes of the court or judge previously settled by the judge.

Defendant then moved the court for an arrest of judgment and an order that a judgment of acquittal be entered in his favor and that he be discharged from custody, and that the indictment herein be not further prosecuted, for the following reasons:

1. Because the verdict found by the jury and recorded in the minutes of this court is uncertain and indefinite in this, that it is impossible to determine from said verdict of what offense the jury intended, by their said verdict, to find the respondent guilty, whether of murder, manslaughter, or of an assault with intent to commit murder.

2. Because he had been tried under the indictment lodged against him, and the jury which tried him has been discharged without rendering

122 a legal verdict against him and without finding him guilty of any offense. He therefore stands acquitted of the charge.

3. That the jury was, after being duly impaneled, sworn, and charged by the court, discharged without the consent of the respondent and without any overruling necessary before rendering a valid and legal verdict against him.

4. That he has been tried by a jury, that no verdict valid in law stands against him, and that there is no judgment or order of this court existing under which he can be legally detained.

The court overruled said motions and each of them.

To which said rulings of the court counsel for the defendant then and there duly excepted, and hereby tenders this his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.

The court proceeded to sentence the defendant, and directed that he be taken by the marshal of the district and confined in close custody in the prison of the city and county of San Francisco until the 6th day of October next, and then be taken by the United States marshal to some suitable place in the district, and between the hours of one and four in the afternoon of that day be hung by the neck until he shall be dead.

To which said order and judgment of the court counsel for the defendant then and there duly excepted, and hereby tenders this his bill of exceptions to the court to sign and seal, and the court does hereby sign and seal the same.

123 And now, in furtherance of justice and that right may be done, the defendant presents the foregoing bill of exceptions in this case, and prays that the same be settled and allowed and signed and certified by the judge as required by law.

J. F. SMITH &
F. J. KIERCE,
Attorneys for Defendant.

Correct.

CHAS. A. GARTER,
U. S. Atty.

The foregoing bill of exceptions is correct, and is hereby settled, allowed, and signed this 25th day of September, 1893.

J. MCKENNA,
United States Circuit Judge, Northern District of California.

(Endorsed:) No. 2173. U. S. circuit court, ninth circuit, northern district of California. United States of America vs. Thomas St. Clair et al., defendants. Bill of exceptions of Thomas St. Clair. Filed Sept. 25th, 1893. W. J. Costigan, clerk.

124 *Petition of Thomas St. Clair for a writ of error.*

In the United States circuit court, northern district of California.

UNITED STATES OF AMERICA, COMPLAINANT,
vs.
THOMAS ST. CLAIR ET AL., DEFENDANTS.

Petition of defendant, Thomas St. Clair, for an order allowing a writ of error.

Thomas St. Clair, one of the defendants in the above-entitled cause' feeling himself aggrieved by the verdict of the jury and the judgment entered on the 6th day of July, 1893, in pursuance of said verdict whereby it was ordered, adjudged, and decreed that the defendant be taken by the marshal of the northern district of California and confined in the prison in the city and county of San Francisco until the 6th day of October, 1893, and on said day be by said marshal hung by the neck until he shall be dead, between the hours of one and four in the afternoon of said day, comes now by J. F. Smith and F. J. Kierce, his attorneys, and petitions this court for an order allowing said defendant to prosecute a writ of error

to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and that upon the allowance of said writ of error all further pro-
125 ceedings in this court be suspended and stayed until the determination of said writ of error by the United States Supreme Court.

And your petitioner will ever pray.

J. F. SMITH & F. J. KIERCE,
Attorneys for Defendant, Thomas St. Clair.

(Endorsed): Filed August 22d, 1893. W. J. Coetigan, clerk.

126 *Assignment of errors.*

In the United States Supreme Court.

THOMAS ST. CLAIR, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

Now comes Thomas St. Clair, the plaintiff in error herein, by J. F. Smith and F. J. Kierce, his attorneys and counsel, particularly specifies the following as the errors upon which he will rely and which he will urge upon his writ of error in the above entitled cause.

1. That the circuit court of the northern district of California erred in overruling the demurrer of the plaintiff in error interposed to the indictment filed against him.

2. That said court erred in overruling the objection of the plaintiff in error to the jury upon the ground that the power of the court had been exhausted when the regular venire of jurrors for the February term, 1893, was discharged.

3. That said court erred in overruling the objection of the plaintiff in error to the jury because the method of sommoning them did not conform with the provisions of the Revised Statutes either for talesmen or special jurors.

4. That said court erred in overruling the objection of the plaintiff in error to the jury upon the ground that at the beginning of each term the names of three hundred qualified jurors were not placed in the jury box as required by law.

127 5. That said court erred in denying the challenge interposed by the plaintiff in error to the jury before they were sworn in the said cause.

6. That said court erred in compelling the plaintiff in error to exercise his peremptory challenge immediately upon the conclusion of the examination of the first juror in the box and in not permitting an examination of the twelve jurors in the box *and in not permitting an examination of the twelve jurors in the box* before being called upon to exercise his peremptory challenges.

7. That said court erred in compelling plaintiff in error to exercise his peremptory challenges immediately upon the conclusion of the examination of each separate juror.

8. That said court erred in denying the challenge of the plaintiff in error to each separate juror after he entered the jury box and was sworn.

9. That said court erred in denying the challenge of the plaintiff in error to the talesman who were summoned into court on the 15th day of June, 1893.

10. That said court erred in overruling the objection of the plaintiff in error to each separate talesman after he entered the box and was sworn.

11. That said court erred in overruling the objection of the plaintiff in error to the entire panel of jurors sworn to try the case.

12. That said court erred in overruling the objection of the plaintiff in error to the following question asked the witness, F. O. Sodergren, on direct examination:

"Q. When you came on deck you made this search, and then
128 you asked the man at the wheel where the mate was?" and in permitting the said witness to answer the same.

13. That said court erred in overruling the objection of the plaintiff in error to the witness, F. O. Sodergren, testifying as to what any one said unless the plaintiff in error was present.

14. That said court erred in overruling the objection and denying the motion of the plaintiff in error to strike out the testimony of the witness, F. O. Sodergren, as to the condition of Herman Sparf who had been jointly charged with the plaintiff in error in the indictment, there being no charge of conspiracy alleged in said indictment and the said Herman Sparf not being on trial.

15. That said court erred in overruling the objection of the plaintiff in error to the request of the United States district attorney to cross-examine his witness, Edward Larsen, who was on the stand and who was testifying contrary to the expectations of the said United States district attorney.

16. That said court erred in overruling the objection of the plaintiff in error to the following question asked the witness, Edward Larsen:

"Q. Were you ever present before the disappearance of the second mate when the subject was discussed of taking the ship?" and in permitting the witness to answer said question.

17. That said court erred in overruling the motion of the plaintiff in error to strike out the testimony of the witness, Edward Larsen, as to what Hans Hansen said when the plaintiff in error was not present, there being no charge of conspiracy alleged in the indictment and the
129 said Hans Hansen not being on trial.

18. That said court erred in overruling the objection and denying the motion of the plaintiff in error to strike out the testimony of the witness, Thomas Green, as to what he saw Hans Hansen doing, no charge of conspiracy being alleged in the indictment and the said Hand Hansen not being on trial.

19. That said court erred in denying the motion of the plaintiff in error to compel the United States district attorney to submit to the counsel for the plaintiff in error the statements of the witnesses taken before the United States counsel at Tahiti.

20. That said court erred in denying the motion of the plaintiff in error to compel the production of the letter written by the witness, Thomas Green, to the United States district attorney, together with a statement taken down by him at the same time.

21. That said court erred in overruling the objection of the plaintiff in error to the question as to who called the witness, Jens Olsen, and in permitting him to answer the same when there was no conspiracy alleged in the indictment and Herman Sparf was not on trial.

22. That said court erred in denying the motion of the plaintiff in error to permit him to inspect the testimony of witnesses taken before the United States consul at Tahiti.

23. That said court erred in overruling the objection of the plaintiff in error to the certificate of registration of the bark Hesper, and in assuming that proof of the citizenship of the owners of the vessel was sufficiently proven by the certificate of registration.

130 24. That said court erred in overruling the objection of the plaintiff in error to the following question, asked the witness, F. O. Sodergren:

"Q. During the voyage that you were on what flag did the Hesper carry?" and in permitting him to answer the same.

25. That said court erred in overruling the objection of the plaintiff in error to the introduction in evidence of the tin can, hatchet, and club referred to in the bill of exceptions.

26. That said court erred in overruling the objection of the plaintiff in error to the following question, asked witness F. O. Sodergren:

"Q. During the voyage, and particularly on the night of the occurrence of the 13th of January, and for several days prior to that and afterwards, I wish you would explain to the jury whether there was much shipping in sight, or whether there were many vessels that you came in contact with?" and in permitting the said witness to answer the same.

27. That said court erred in overruling the objection of the plaintiff in error to the following question, asked the witness, Jens Olsen:

"Q. That night, at the time you say that Herman Sparf and Hans Hansen came to the forecastle, I would ask you whether either Herman Sparf or Hans Hansen said anything to you or had any conversation with you, and to relate what that conversation was?" and in permitting the witness to answer said question.

28. That said court erred in refusing to give to the jury the following instruction requested by the plaintiff in error: "Manslaughter is
131 the unlawful killing of a human being without malice, expressed or implied, and without any mixture of deliberation whatever. The jury are instructed that under the indictment in this case the defendant, Thomas St. Clair, may be found guilty of manslaughter, and if, after a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendant was guilty of manslaughter, you may so find your verdict."

29. That said court erred in giving the following instruction during the course of the charge to the jury: "I do not consider it necessary, gentlemen, to explain it (referring to manslaughter) further, for if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder."

30. That said court erred in giving the following instruction during the course of the charge to the jury: "Therefore, gentlemen, if you believe

from the evidence, under the instructions I have given you, that Morris Fitzgerald was killed and that Thomas St. Clair did not do the act alone, but was present, willingly aiding or abetting its perpetration, I charge you he is guilty of murder as charged in the indictment."

31. That said court erred in receiving the verdict of the jury against the plaintiff in error for the reason that the said verdict does not find the plaintiff in error guilty of any offence whatever.

32. That said court erred in refusing to give plaintiff in error a new trial in said cause.

132 33. That said court erred in denying the motion of plaintiff in error for an arrest of judgment upon the grounds stated in the bill of exceptions.

34. That said court erred in denying the motion of the plaintiff in error that a judgment of acquittal be entered in his favor and that he be discharged from custody.

35. That the said court erred in sentencing the plaintiff in error to death and in directing the marshal of the said district to carry said judgment into execution.

36. That said court erred in not fixing the place where the execution of the plaintiff in error should take place.

37. That the said court erred in entering any judgment whatever against the plaintiff in error for the reason that no verdict in law stands against him and no order of court was ever made remanding him for sentence.

38. That the judgment in said case is improper, illegal, and insufficient.

39. That said court erred in permitting any evidence whatever as to acts or declarations of alleged conspirators for the reason that no conspiracy is charged in the indictment.

40. That said court erred in holding that rules of criminal procedure of the State in which the trial was had do not apply in a Federal court as to exceptions to the charge given to the jury or the charges requested to be given by the plaintiff in error.

In order that the foregoing assignment of errors may be and appear of record, the plaintiff in error presents the same to the court and prays that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and

133 prays an order that the judgment of the circuit court of the United States in and for the northern district of California be reversed and that he be granted a new trial herein.

J. F. SMITH & F. J. KIERCE,
Counsel for Plaintiff in Error.

(Endorsed:) Filed August 22d, 1893. W. J. Costigan, clerk.

At a stated term, to wit, the July term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 25th day of September, in the year of our Lord one thousand eight hundred and ninety-three.

Present: The Honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA
vs.
THOMAS ST. CLAIR. } No. 2173.

The defendant, Thomas St. Clair, having duly filed his petition for a writ of error to the United States Supreme Court, together with an assignment of errors, within due time, now, on motion of F. J. Kierce, esq., of counsel for said defendant, it is hereby ordered that a writ of error to the United States Supreme Court be granted to said respondent Thomas St. Clair, and that a certified transcript of the record and all proceedings in said cause be transmitted by the clerk of this court to the clerk of the Supreme Court of the United States, and that during the pendency of said writ of error, all proceeding in this court herein shall be stayed until the determination of said writ of error in said Supreme Court of the United States.

135 In the circuit court of the United States ninth judicial circuit northern district of California.

THE UNITED STATES OF AMERICA
vs.
THOMAS ST. CLAIR. } No. 2173.

I, W. J. Costigan, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing one hundred and thirty-four written and printed pages, numbered from 1 to 134 inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above-entitled issue, and that the same constitutes the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 16th day of October, in the year of our Lord one thousand eight hundred and ninety-three.

[SEAL.] W. J. COSTIGAN,
Clerk U. S. Circuit Court, Northern District of California.

136 [Original.]

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you between

Thomas St. Clair, defendant, and plaintiff in error, and the United States, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said Thomas St. Clair, as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, United States of America, on the second Monday of November next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 27th day of September, in the year of our Lord one thousand eight hundred and *eighty*-three and of the independence of the United States the one hundred and eighteenth.

[SEAL.] W. J. COSTIGAN,
Clerk of the Circuit Court of the United States,
Ninth Circuit, Northern District of California.

The above writ of error is hereby allowed.

J. MCKENNA,
Judge of the Circuit Court of the United States,
Ninth Circuit, Northern District of California.

137 Service of the within writ of error and receipt of a copy thereof on this 28th day of September, A. D. 1893, is hereby admitted.

CHAS. A. GARTER,
U. S. District Attorney and Attorney for the
Defendant in Error and Complainant.

The answer of the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] W. J. COSTIGAN,
Clerk.

(Indorsed:) 2173. United States Supreme Court. United States *vs.* Thomas St. Clair. Writ of error. Filed September 28th, 1893. W. J. Costigan, clerk, by H. J. McCormick, deputy clerk.

To United States of America, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 13th day of November, A. D. 1893, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of California, wherein Thomas St. Clair is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said cause mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph McKenna, judge of the circuit court of the United States, ninth circuit, northern district of California, this 27th day of September, A. D. 1893, and of the independence of the United States the one hundred and eighteenth.

J. MCKENNA,
Judge.

139 Service of within citation, by copy, admitted this twenty-eighth day of September, A. D. 1893.

CHAS. A. GARTER,
U. S. District Attorney and
Attorney for Defendant in Error and Complainant.

(Indorsed:) 2173. In the Supreme Court of the United States. United States vs. Thomas St. Clair. Citation. Filed September 28th, 1893. W. J. Costigan, clerk. U. S. circuit court, northern district of California. By H. J. McCormick, deputy clerk.

(Indorsement on cover:) Case No. 15446. Term No. 1062. Thomas St. Clair, plaintiff in error, vs. The United States. N. California, C. C. U. S. Filed November 8, 1893.

FILED.
MAR 5 1894
JAMES H. McKENNEY,
CLERK.

154-134

No. 1,062.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

THOMAS ST. CLAIR, PLAINTIFF IN ERROR,

vs.

UNITED STATES, DEFENDANT IN ERROR.

BRIEF OF THE PLAINTIFF IN ERROR.

J. F. SMITH AND F. J. KIERCE,
Counsel for Plaintiff in Error.

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1893. No. 1,062.

THOMAS ST. CLAIR,

PLAINTIFF IN ERROR,

vs.

UNITED STATES,

DEFENDANT IN ERROR.

BRIEF OF THE PLAINTIFF IN ERROR.

Statement of Facts.

The plaintiff in error, together with Herman Sparf and Hans Hansen were, by an indictment filed in the District Court of the United States for the Northern District of California, charged with the murder of Maurice Fitzgerald, second mate of the bark "Hesper," upon the high seas, on the 13th of January, 1893. The indictment, which is in the Record, folios 1 to 4, was filed on the 5th day of May, 1893, in the U. S. District Court of the Northern District of California, and was thereafter regularly remitted to the Circuit Court of said District. On the 22d of May, the plaintiff in error together with Herman Sparf and Hans Hansen were brought into this Court to be arraigned upon the said charge, and being without means to employ attorneys the Court appointed the counsel here appearing to defend them. On the 24th of May, the defendants demurred to the indictment filed against them upon the grounds: first, that the same did not state facts to constitute a public offense, and, second, that the indictment was uncertain in this (a) that it failed to show upon what portion of the high seas the alleged offense, attempted to be charged, was committed, and (b) it failed to show which one of the defendants committed the alleged assault, and fails to show whether one or more of the

defendants committed any of the acts charged against them. (Record, folio 12.)

The demurrer was on said day overruled, and the defendants thereupon pleaded not guilty, and June 14, 1893, was set as the day of trial. (Record, folios 13 and 14.)

On the 14th day of June, 1893, the defendants moved for a separate trial, and no opposition having been made to said motion, the same was granted, and the trial of the plaintiff in error herein was proceeded with. Thereupon the plaintiff in error challenged the panel of jurors summoned and in attendance before the Court for the trial of said plaintiff in error, upon the ground that the regular panel of jurors for the February term, 1893, of the United States Circuit Court, had been discharged, and that the Court had exhausted its powers to summon a jury to act during the term after the original panel had been discharged, and on the further grounds that the statutes had not been complied with in summoning the said jurors, and that at the time of the drawing of the names of said jurors from the jury box, the said box had not been refilled with 300 new names, but a portion of the names therein were names remaining after previous drawings of previous terms (Record, folios 40 to 43, inclusive). The Court overruled the defendant's said objection, and denied said challenge; to which ruling of the Court exception was duly taken.

Upon twelve persons being drawn and called into the jury box, the plaintiff in error renewed his objections and challenge to the jurors, and to each of them, upon the grounds above, which said objection the Court overruled, and to which defendant duly excepted (Record, folio 43). After the first juror had been examined as to his qualifications and passed by the United States and the defendant for cause, the Court announced that the juror must be sworn to try the case unless challenged by the United States or the defendant, and that this rule would be enforced as to each subsequent juror. The plaintiff in error claimed the right to examine all of the twelve jurors in the box as to their qualifications, before exercising the peremptory challenge, and excepted to the ruling announced by the Court. Rule 63 of the said Circuit Court provides, among other things, that in criminal cases a juror shall be challenged or accepted and sworn as soon as his examination is completed, and before the examination of another juror (Record, folio 44). The plaintiff in error contends that this rule is unconstitutional and void, and that the ruling of the Court is error, for the reason that it deprives the defendant in a criminal case of a constitutional privilege to examine all the jurors in the box before be-

ing called upon to exercise his peremptory challenges. The defendant also challenged each separate juror, upon the grounds first hereinabove stated, which challenges were overruled by the Court and excepted to by the plaintiff in error (Record, folio 44).

The panel of jurors having been exhausted after eight jurors had been examined, accepted and sworn, the Court ordered the marshal to summon twenty-five talesmen to serve as trial jurors in the case. To which venire of talesmen the plaintiff in error excepted, but which exception was overruled by the Court. (Record, folio 44.)

After a jury of twelve had been impaneled and sworn to try the case, the defendant objected to the entire panel of jurors, for the reasons set forth in objecting to the original panel of jurors. Which objection the Court overruled, and the counsel for the defendant in error having made his opening statement, the trial of said cause was proceeded with.

The testimony in the case is contained in the bill of exceptions, from pages 18 to 54 of the printed record. The plaintiff in error contends that the Court committed several errors in its rulings on the admission and rejection of testimony.

When the witness, F. O. Sodergren, was testifying as a witness on behalf of the United States, he was asked as to what the first mate said to him when he went upon the deck load about the hour of midnight on the night of the alleged murder, and also as to the condition of the cheeks of Herman Sparf at the same time. The counsel for the plaintiff in error objected to these questions and to this testimony, but the Court overruled the objections of the counsel, and they are here assigned as error (Record, folios 50 and 53).

The basis of the latter objection is that there is no conspiracy alleged in the indictment in this case, and, therefore, it is immaterial as to what the condition of Herman Sparf, or any other person, was after the alleged offense, if any had been committed. The Court also permitted the United States District Attorney to cross-examine a witness, Edward Larsen, who, having gone on the stand as a witness on behalf of the defendant in error, testified contrary to the expectations of the United States District Attorney. (Record, folios 69 and 70.)

The Court also, against the objection of the plaintiff in error, permitted the witness Edward Larsen to testify as to what was said before the disappearance of the second mate when the subject of taking the ship was discussed, notwithstanding that there is no allegation of the existence of a conspiracy in the indictment in this case, and that is the only possible basis upon

which the witness could be allowed to testify as to the statements made by any person except the party upon trial. (Record, folio 70.)

The Court also erred in permitting witnesses to testify as to what Hans Hansen and Herman Sparf, who were not upon trial, had said to various witnesses, and as to their actions on the night of the alleged killing, there being no charge of conspiracy alleged in the indictment. The plaintiff in error further urges that the Court erred in permitting the introduction in evidence of the certificate of registration of the bark Hesper, and in assuming that proof of the citizenship of the owners of the vessel was sufficiently proved by the certificate of registration. (Record, folios 94 and 95.)

The Court also erred in permitting the witness F. O. Sodergren to testify as to what flag the Hesper carried while she was upon her voyage. (Record, folio 95.) The Court also committed an error in permitting the witness Jens Olsen to testify as to what Herman Sparf and Hans Hansen said to him in the forecastle after the alleged killing had taken place (Record, folio 117), first, because there is no allegation in the indictment that a conspiracy existed between the plaintiff in error, Herman Sparf and Hans Hansen to kill the second mate; and, secondly, if it be deemed unnecessary to allege a conspiracy, and if it be deemed that Hans Hansen and Herman Sparf are co-conspirators with the plaintiff in error, then the statements are inadmissible against him when upon trial, for the reason that they are the statements of a co-conspirator, made after the consummation of the conspiracy; and it will certainly not be contended that the killing of the second mate took place, if it did at all, later than half-past ten on the evening of January 13, 1893.

The plaintiff in error also contends that the Court erred in the instructions given to the jury, as will hereafter appear in the assignment of errors, and also in refusing to give certain instructions requested by the plaintiff in error. Upon the conclusion of the taking of testimony and the argument of counsel in the case, the Court gave its charge to the jury on the 20th day of June, 1893, and thereafter, on the said day, the jury brought in the following verdict: "We, the jury, find Thomas St. Clair, the prisoner at the bar, guilty." To which verdict the counsel for the plaintiff in error then and there duly excepted. (Record, folios 120 and 121.)

On the jury being discharged, the Court made the following and no other order:

"It is ordered that sentence be pronounced on Thursday,

July 6, 1893." On the 6th day of July, 1893, the plaintiff in error was brought into Court for the purpose of being sentenced upon the verdict rendered as above, but before sentence was passed upon him, he, by his counsel, moved for a new trial of said cause, which after argument, the Court denied. Thereupon the said plaintiff in error moved the Court for an arrest of judgment and an order that a judgment of acquittal be entered in his favor, and that he be discharged from custody, and that the indictment be not further prosecuted against him, for the reason that the verdict found by the jury and recorded in the minutes of the Court was uncertain and indefinite in this, that it was impossible to determine from the said verdict, of what offense the jury intended to find the plaintiff in error guilty, whether of murder, manslaughter, or of an assault or of attempt to commit murder. 2. Because he had been tried under the indictment lodged against him, the jury which tried him had been discharged without rendering a legal verdict, and without finding him guilty of any offense. 3. That the said jury was discharged without the consent of the plaintiff in error and without any overruling necessity before rendering a valid and legal verdict. 4. That no verdict valid in law stands against him, and that there was no order or judgment of Court upon which he could be legally detained. The Court, after argument, overruled the said motions in arrest of judgment, and the defendant excepted to the rulings. (Record, folios 121 and 122.)

The Court then proceeded to sentence the prisoner and directed that a judgment be entered in said cause whereby it was ordered, adjudged and decreed that the plaintiff in error be taken by the marshal of the Northern District of California, and be confined in close custody in the prison of the City and County of San Francisco, until the 6th day of October, 1893, and that he be then taken by the United States Marshal to some suitable place in the district, and be, between the hours of one and four in the afternoon of said day, hung by the neck until he shall be dead. To which said judgment the plaintiff in error duly excepted. The judgment is in the record, folios 33 and 34. The plaintiff in error contends that the verdict in this case is insufficient upon which to base a judgment sentencing him to death for an alleged crime of murder, and that the order which was entered immediately after the entry of the said verdict, did not set forth that the plaintiff in error was guilty of any specific offense, nor did it remand him for sentence for any specific offense. It is further contended that the judgment in this case is totally insufficient and does not conform to the in-

dictment or to the verdict found by the jury. After the sentence had been pronounced the plaintiff in error duly prepared a bill of exceptions which is contained in the record in this case, from folio 40 to folio 143 inclusive, which said bill of exceptions has been duly settled, allowed and signed by the Judge who tried said cause. The plaintiff in error also within proper time, and under and in pursuance with the statutes of the United States in such cases made and provided, presented to the Court a petition praying for a writ of error to this Court, together with an assignment of errors, and a writ of error was thereafter granted, and the case has been brought to this Court for review.

Assignment of Errors.

The assignment of errors filed by the plaintiff in error are to be found in the Record, folios 126 to 133 inclusive, and are forty in number. The errors assigned and upon which the plaintiff in error now relies for a reversal of the judgment in this case, are as follows:

1—That the Court erred in overruling the demurrer interposed to the indictment.

2—In overruling the objection to the jury upon the ground that the power of the Court had been exhausted when the regular venire of jurors for the February Term, 1893, was discharged.

3—In overruling the objection to the jury because the method of summoning them did not conform with the provisions of the revised statutes, either for talesman or special jurors.

4—In overruling the objection to the jury upon the ground that at the beginning of each term the names of three hundred qualified jurors were not placed in the jury box as required by law.

5—In denying the challenge interposed to the jury before they were sworn in the said cause.

6—In compelling the plaintiff in error to exercise his peremptory challenge immediately upon the conclusion of the examination of the first juror in the box, and in not permitting an examination of the twelve jurors in the box before being called upon to exercise his peremptory challenges.

7—In compelling plaintiff in error to exercise his peremptory challenges immediately upon the conclusion of the examination of each separate juror.

8—In denying the challenge to each separate juror after he entered the jury-box and was sworn.

9—In denying the challenge to the talesmen who were summoned into Court on the 15th day of June, 1893.

10—In overruling the objection to each separate talesman after he entered the box and was sworn.

11—In overruling the objection to the entire panel of jurors sworn to try the case.

13—In overruling the objection to the witness F. O. Sodergren testifying as to what any one said unless the plaintiff in error was present.

14—In overruling the objection and denying the motion of the plaintiff in error to strike out the testimony of the witness F. O. Sodergren as to the condition of Herman Sparf, who had been jointly charged with the plaintiff in error in the indictment, there being no charge of conspiracy alleged in said indictment, and the said Herman Sparf not being on trial.

15—In overruling the objection to the request of the United States District Attorney to cross-examine his witness, Edward Larsen, who was on the stand and who was testifying contrary to the expectations of the said United States District Attorney.

16—In overruling the objection to the following question asked the witness, Edward Larsen:

"Q.—Were you ever present, before the disappearance of the second mate, when the subject was discussed of taking the ship?" and in permiting the witness to answer said question.

17—In overruling the motion to strike out the testimony of the witness Ah Hong as to what Hans Hansen said when the plaintiff in error was not present, there being no charge of conspiracy alleged in the indictment, and the said Hans Hansen not being on trial.

18—In overruling the objection and denying the motion of the plaintiff in error to strike out the testimony of the witness Thomas Green as to what he saw Hans Hansen doing, no charge of conspiracy being alleged in the indictment, and the said Hans Hansen not being on trial.

19—In denying the motion of the plaintiff in error to compel the United States District Attorney to submit to the counsel for the plaintiff in error the statements of the witnesses taken before the United States Consul at Tahiti.

20—In denying the motion of the plaintiff in error to compel the production of the letter written by the witness, Thomas Green, to the United States District Attorney, together with a statement taken down by him at the same time.

21—In overruling the objection of the plaintiff in error to the question as to who called the witness, Jens Olsen, and in permiting him to answer the same, when there was no conspiracy alleged in the indictment and Herman Sparf was not on trial.

22—In denying the motion of the plaintiff in error to permit him to inspect the testimony of witnesses taken before the United States Consul at Tahiti.

23—In overruling the objection of the plaintiff in error to the certificate of registration of the bark "Hesper," and in assuming that proof of the citizenship of the owners of the vessel was sufficiently proven by the certificate of registration.

24—In overruling the objection of the plaintiff in error to the following question asked the witness, F. O. Sodergren:

"Q.—During the voyage that you were on what flag did the 'Hesper' carry?" and in permiting him to answer the same.

26—In overruling the objection of the plaintiff in error to the following question asked witness, F. O. Sodergren:

"Q.—During the voyage and particularly on the night of the occurrence of the 13th of January, and for several days prior to that and afterwards, I wish you would explain to the jury whether there was much shipping in sight, or whether there were many vessels that you came in contact with?" and in permitting the said witness to answer the same.

27—In overruling the objection of the plaintiff in error to the following question asked the witness, Jens Olsen:

"Q.—That night, at the time you say that Herman Sparf and Hans Hansen came to the forecastle, I would ask you whether either Herman Sparf or Hans Hansen said anything to you or had any conversation with you, and to relate what that conversation was?" and in permitting the witness to answer said question.

28—In refusing to give to the jury the following instruction requested by the plaintiff in error: "Manslaughter is the unlawful killing of a human being without malice expressed or implied and without any mixture of deliberation whatever. The jury are instructed that under the indictment in this case the defendant, Thomas St. Clair, may be found guilty of manslaughter, and, if after a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendant was guilty of manslaughter, you may so find your verdict.

29—In giving the following instruction during the course of the charge to the jury: "I do not consider it necessary, gentlemen, to explain it (referring to manslaughter) further, for if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder."

30—That said Court erred in giving the following instruction during the course of the charge to the jury: "Therefore,

gentlemen, if you believe from the evidence, under the instructions I have given you, that Maurice Fitzgerald was killed, and that Thomas St. Clair did not do the act alone, but was present, willingly aiding or abetting its perpetration, I charge you he is guilty of murder as charged in the indictment."

31—In receiving the verdict of the jury against the plaintiff in error for the reason that the said verdict does not find the plaintiff in error guilty of any offense whatever.

33—In overruling the motion of plaintiff in error for an arrest of judgment upon the grounds stated in the Bill of Exceptions.

34—In denying the motion of the plaintiff in error that a judgment of acquittal be entered in his favor and that he be discharged from custody.

35—In sentencing the plaintiff in error to death and in directing the marshal of the said district to carry said judgment into execution.

36—In not fixing the place where the execution of the plaintiff in error should take place.

36*a*—In entering any judgment whatever against the plaintiff in error. for the reason that no verdict in law stands against him, and no order of Court was ever made remanding him for sentence.

37—That the judgment in said case is improper, illegal and insufficient.

38—That said Court erred in permitting any evidence whatever as to acts or declarations of alleged conspirators, for the reason that no conspiracy is charged in the indictment.

39—That said Court erred in holding that rules of criminal procedure of the State in which the trial was had do not apply in a federal court as to exceptions to the charge given to the jury, or the charges requested to be given by the plaintiff in error.

Argument.

We now reach the consideration of the questions of law involved on this writ of error as specified in the preceding errors and in that view of the case we proceed to a consideration of each error, because it can, we believe, be satisfactorily shown to the Court that the plaintiff in error in this case is entitled to have the judgment, which has been entered against him, reversed in this tribunal and remanded to the lower Court with direction to grant a *venire de novo.*

Exception 1.

The Court erred in overruling the demurrer of the plaintiff in error to the indictment.

The indictment under which Thomas St. Clair was tried, found guilty and sentenced to death, does not charge him with the crime of murder. It charges first, that Thomas St. Clair, Herman Sparf and Hans Hansen did, upon Maurice Fitzgerald, piratically, wilfully, feloniously and with malice aforethought, make an assault; second, that with a weapon unknown held in the hands of one of them unknown, several grievous and mortal wounds were piratically, willfully, feloniously, and with malice aforethought, inflicted on Maurice Fitzgerald; third, that Thomas St. Clair, Herman Sparf and Hans Hansen did cast, plunge, sink and drown Maurice Fitzgerald in the sea—of which mortal wounds, casting, sinking, plunging and drowning, it is alleged, that Maurice Fitzgerald then and there instantly died, so the grand jurors do say that Thomas St. Clair, Herman Sparf and Hans Hansen did, in the manner and form aforesaid, willfully, and with malice aforethought, kill and murder Maurice Fitzgerald. (Record, folio 1 to 5.)

An analysis of the indictment shows, first, that there was a felonious, willful, piratical, malicious assault from which it does not appear that any injury resulted; second, that with a weapon held in the hands of one of the parties charged there was a piratical, willful, malicious, felonious assault which produced mortal wounds; and third, that the parties charged, cast, sunk, plunged, and drowned Maurice Fitzgerald in the sea, which casting, plunging, sinking and drowning it is not alleged was piratical, willful, felonious, or with malice aforethought, but from which and from the mortal wounds it is alleged he instantly died. The indictment does not allege that there was any conspiracy or concert of action between any of the parties charged, nor does it allege that any of them aided, abetted, counseled, or encouraged the one who inflicted the wounds from which Maurice Fitzgerald instantly died. To charge all for the acts of one it should have been alleged that there was a conspiracy or concert of action among all to do the things from which death resulted, or that the others aided, abetted, encouraged, counseled or countenanced the one who did them. The casting, sinking, plunging and drowning of Maurice Fitzgerald in the sea by the parties charged, is nowhere alleged to have been done either feloniously, or piratically, or willfully, or with malice aforethought, or with intent to kill or murder Maurice

Fitzgerald, in fact none of the acts alleged are stated to have been done with the intent to kill or murder. Having attempted to allege the acts which resulted in the killing, the indictment to make that killing murder, should have alleged that the acts were done with intent to kill or murder. The acts might have been done feloniously, or piratically, or willfully, or with malice aforethought, or any or all of them combined, and still not be done with intent to kill or murder. The indictment is not aided by the allegation which is practically to the following effect, viz.: "And so, therefore, the grand jury do say that "Thomas St. Clair, Herman Sparf and Hans Hansen, in the "manner and form aforesaid, did piratically, feloniously, will-"fully, and with malice aforethought, kill and murder Maurice "Fitzgerald." This is substantially the concluding allegation of the indictment, and in no way cures its inherent defects, because it is avowedly the deduction and inference drawn by the grand jurors from the facts previously alleged.

If the facts previously alleged stated are not sufficient to constitute the crime of murder, the allegation in the indictment that they do is not binding on the Court, nor does it charge the plaintiff in error with the crime of murder. The allegation is simply a deduction from certain premises, and if those premises fall, the deduction drawn from them must fall with them. The indictment probably well charged an assault, but does not charge murder.

The indictment in this case certainly does not charge murder, and is almost identical in form with the indictment found in the case of *Ball* vs. *The United States*, 118 U. S., at pages 121 and 122; and is justly subject to the same criticism that the Court made in that case, that the "defendants were well charged with assault, but not with murder."

Exceptions 2, 3, 4, 5, 8, 9, 10 and 11.

These exceptions relate to the same subject matter, and are found in the record from folios 40 to 46. It appears from the bill of exceptions that on the 1st of February, 1893, which was a day in the November term of the United States Circuit Court for the Northern District of California, an order was made directing a venire of jurors to be summoned, returnable on the 14th of February, 1893, which was a day in the February term of said Court, commencing on the first Monday of February. On a subsequent day, to wit: the 2d day of March, 1893, an order was made discharging the said venire of jurors for the said February term. Our position is that the Circuit Court

cannot, in the November term, direct a venire of jurors to be drawn for the February term of said Court, but that all orders for a venire of jurors for a specified term must be made within that term. Further, that the Court, having discharged the regular panel of jurors for the February term, no power exists in the Court to draw another venire of jurors from the regular jury box as it did in this case for the purpose of this trial. We contend that when the term jury was discharged, the Court had no power to draw another jury for the same term from the box, but that the Court should have summoned a special jury under section 805 of the Revised Statutes, else what purpose can that section of the statute have? In addition to that, the Court permitted the drawing of the said venire of jurors from a box which had therein a portion of names remaining after previous drawings of previous terms of the Court and other names placed therein afterwards. We contend that at the beginning of each term, it is the duty of the Court to direct the clerk of the Court and the jury commissioner to place in the jury box three hundred new names, and not to permit the placing in the box of sufficient names to make up for those which are taken out at a previous drawing. If the law be otherwise, it may be that there would in reality be but two hundred names of qualified jurors in the box, for the names of those who had been placed in at previous terms may all be dead, or numberless names may be duplicated.

The objection made to the talesmen is upon the ground that a jury having been improperly summond for the trial of said case originally, there was no occasion for talesmen, and on the further ground that the order of Court by which the said talesmen were summoned does not comply with section 804 of the Revised Statutes, which provides that the said talesmen shall be summoned from bystanders.

Exceptions 6 and 7.

The Court erred in compelling the plaintiff in error, against his objection, to exercise the right of peremptory challenge immediately upon the conclusion of the examination of each juror, touching his qualifications, and in not permitting him to examine all twelve men before exercising his peremptory right of challenge. (Record, folio 40.)

(a) The plaintiff in error claims that at any time before twelve men had been sworn as jurors to try the case, he had the right to exercise a peremptory challenge as to each of them, and that he was illegally deprived of the privilege of the per-

emptory challenge, by being compelled by the Court to exercise it immediately after each talesman was examined touching his qualifications. The ruling of the Court gave to the plaintiff in error only the answers and demeanor of the talesmen as a guide for the exercise of his right, and took away from him the invaluable advantage of the relations of one man's personality to that of another. A defendant in a criminal prosecution might be entirely willing to be tried by twelve men of great force of character, and yet not be willing to be tried by twelve men, ten of whom might be dominated by the other two, in other words, before exercising a peremptory challenge, a defendant has a right to know not only the relation the prospective juror bears to the case and to him, but also the relation such juror bears to every other prospective juror.

Hunter vs. *Parsons*, 22 Mich., 96 to 101, citing 4 Bl. Com., 353.

Sterling Bridge Co. vs. *Pearl*, 80 Ill., 251 to 254.

Taylor vs. *The Western Pacific R. R. Co.*, 45 Cal., 323.

The rule permitting the examination of the entire twelve men before a party is required to exercise a peremptory challenge is one which exists in all civil cases, and for how much greater reason ought such to be the rule in cases where the issue to be determined is one of life and death?

In the case of *Lamb* vs. *The State*, 36 Wisconsin, 424, a murder case, the lower Court did precisely what the Judge of the lower Court in the case at bar did, compelled the defendant upon the completion of the examination of the first juror for cause to challenge him peremptorily if at all. And the Supreme Court of Wisconsin to which the case was taken by writ of error reversed the judgment and says, pages 427 and 428:

"We cannot but agree with the learned counsel for the "plaintiff in error, *that this mode of impaneling the jury largely* "*impaired the right of peremptory challenge*, essential in con- "templation of law to the impartiality of the trial. For it is, "as Blackstone says, an arbitrary and capricious right, and it "must be exercised with full freedom, or it fails of its full pur- "pose. *The mode adopted* GAVE NO OPPORTUNITY *for comparison* "*and choice between jurors*, and little opportunity for observance "of each juror, apparently essential to the exercise of a right "so visionary and fanciful. That was undoubtedly the English "practice at the common law."

(b) Plaintiff in error insists that in the State of California, in which the Circuit Court of the Northern District of California is held, the practice is well established that a defendant

must be allowed to examine the whole twelve in the box before being compelled to exercise his right of peremtory challenge as to any.

People vs. *Scoggins*, 37 Cal., 676.
People vs. *Jenks*, 24 Cal., 11.
People vs. *Iams*, 57 Cal., 115.

The practice in United States Courts in the matter of impaneling juries must conform as far as may be practicable to existing laws in the particular States.

United States vs. *Douglass*, 2 Blatchf., 207 to 213.
2 U. S. Statutes at Large, 82.
5 U. S. Statutes at Large, 394.
Revised Statutes, Section 800.
Southern Pac. Co. vs. *Rauh*, 49 Fed. Rep., 416.

We therefore contend that under section 800 of the revised statutes, while the Court may make a rule requiring the method of impaneling juries to conform to the State Court practice, or may follow the common law, there is no power existing in the Court to make a rule which antagonizes either the common law or the State statute of the State in which the trial is being held. As a consequence, we contend that the rule which has been adopted by the Circuit Court of the Northern District of California (Record, folio 44), being contrary to the rule at common law and in opposition to the rule of practice laid down by the statutes of the State of California, is unconstitutional and void. We are further assisted in this contention by the rule of procedure as laid down by section 722 of the Revised Statutes, in which it is said: If the laws of the United States are "deficient in the " provisions necessary to furnish suitable remedies and punish " offenses against law, the common law, as modified and changed " by the constitution and statute of the State wherein the Court " having jurisdiction of such civil or criminal cause is held, so " far as the same is not inconsistent with the constitution and " laws of the United States, shall be extended to and govern " the said courts in the trial and disposition of the cause," etc.

Mr. Justice Brewer, of this Court, decided in the case of *United States* vs. *Eagan*, 30 Fed. Rep., at page 608, that this section of the Revised Statutes empowered the Federal Court to follow the practice of the State courts with reference to the objections to an indictment presented by a grand jury on the ground of irregularity in the method of summoning them. (See particularly page 610 of the opinion.) Therefore, we contend, in this case, that the rule of the Circuit Court being

in conflict with the common law, and also in conflict with the State statute, is absolutely void.

Exceptions 13, 14, 16, 17, 18, 21, 27 and 39.

All these exceptions relate to the admission of testimony over the objections of the plaintiff in error, or to the denial of motions to strike out the testimony of witnesses.

The thirteenth exception is found in the record, folios 50 and 51, and the Court then permitted the witness Sodergren, over the objection of the plaintiff in error, to testify as to what Sparf and Hansen and others had told him more than two hours after the alleged killing had taken place.

The fourteenth exception is taken to the ruling of the Court in permitting the same witness to testify as to the condition of the face of Herman Sparf when he was brought into the captain's cabin about the hour of one o'clock at night to have his statement entered in the official log. (Record, folio 53.)

The sixteenth exception is taken to the ruling of the Court permitting the witness Edward Larsen, to answer the following question: "Were you ever present before the disappear-
"ance of the second mate when the subject was discussed of
"taking the ship?" (Record, folio 70.)

The seventeenth exception relates to the testimony given by the Chinese cook as to what Hansen said to him when he came from his bunk. (Record, folio 75.)

The eighteenth exception was to the ruling of the Court admitting statements respecting Hansen's acts as testified to by the witness Green. (Record, folio 78.)

The twenty-first exception relates to the overruling of an objection to the question as to who called the witness Olsen, and as to what was said or done by him. (Record, folio 90.)

The twenty-seventh exception relates to the same subject matter, and is found in the Record, folios 117 and 118.

The thirty-ninth exception relates to the error of the Court in permitting any evidence whatever as to the acts or declarations of alleged conspirators, for the reason that no conspiracy is charged in the indictment. The last exception is general, and is practically a grouping of the other seven exceptions under this head.

In discussing our demurrer to the indictment, we have urged upon the attention of the Court that it does not state facts sufficient to constitute a public offense, much less does it state facts sufficient to constitute the crime of murder.

We have also urged upon the attention of this Court the fact

that there is no charge of conspiracy set out in the indictment, either directly or by implication, and we understand the rule laid down by this Court to be, that if a conspiracy is to be proven, it must be alleged in the indictment. In *Pettibone* vs. *United States*, 148 U. S., 197, this Court said: "The general "rule in reference *to an indictment is that all the material facts* "*and circumstances embraced in the definition of the offense must* "*be stated*, and that if any essential element of the crime is "omitted, such omission cannot be supplied by intendment or "implication. The charge must be directly and not inferen- "tially, or by way of recital. *U. S.* vs. *Hess*, 124 U. S., 482, "486, and in *United States* vs. *Britton*, 108 U. S., 199, it was "held in an indictment for conspiracy under section 5440 of "the revised statutes, that the *conspiracy* must be sufficiently "charged, and cannot be aided by averments of acts done by "one or more of the conspirators in furtherance of the objects "of the conspiracy."

In the case at bar, although admittedly no allegation of conspiracy exists in the indictment, the Court below permitted witness after witness, over our objections, as specified in the exceptions, were now considering, to testify as to the acts, appearances and declarations of Herman Sparf and Hans Hansen, upon the assumption that being charged jointly in the indictment with the plaintiff in error, they were co-conspirators, and therefore the testimony was admissable as against him.

The admission of this testimony prejudiced, as it was undoubtedly intended to prejudice the jury against the defendant on trial. It had no legitimate bearing upon the inquiry as to the crime charged, and prejudiced the minds of the jurors so much against the defendant, that they, under the very meager testimony in this case, found him guilty.

Another objection which we urge to the admission of the acts, appearances and declarations of Herman Sparf and Hans Hansen, as against the plaintiff in error, is that if it be deemed that a conspiracy is sufficiently alleged (a fact we do not concede to be true), the testimony of the witnesses were of acts, appearances and declarations of alleged co-conspirators after the consummation of the conspiracy, which, if one existed, perished with the killing of the second mate, therefore the lower Court erred in admitting these statements upon the trial of the case. The testimony shows that if the mate was killed, it must have been about 10:30 at night. See testimony of F. O. Sodergren, folios 49, 56 and 57; testimony of Larsen, folio 68, where he says: "I saw him (referring to the second mate) at half past ten o'clock." * * "St. Clair went forward and the mate

"followed him. * * About a moment after the mate went "forward with St. Clair, I heard the dog bark, and the man "sing out." Also in the testimony of Langlois, he sets the hour at ten or quarter past ten. (Record, folio 92.) Mrs. Sodergren, who saw the second mate and St. Clair go by the window of her cabin, stated that the time was about half past ten when she heard the shrieks and the mate cry out. (Record, folio 96.) This fact being established from the testimony, it was error to permit the witness, Sodergren, to testify as to statements made by Sparf after twelve o'clock at night (folio 51), or as to his condition in the cabin at or after one o'clock in the morning (folio 53). It was also error to permit Larsen to testify as to what was said before the mate disappeared. It was therefore error on the part of the Court to permit any of the testimony covered by the exceptions which we are now considering: first, because no conspiracy is alleged in the indictment, and second, all the facts testified to are of occurrences which happened after the consummation of the alleged conspiracy and therefore they are inadmissable.

1 Greenleaf, Section 111.

Declarations of conspirators after the consummation of conspiracy are inadmissable.

People vs. *Moore*, 45 Cal., 19.
People vs. *English*, 52 Cal., 212.
People vs. *Stanley*, 47 Cal., 114.
People vs. *Aleck*, 61 Cal., 138.
People vs. *Irwin*, 77 Cal., 502.

This Court, in the very recent case of *Brown* vs. *United States*, 14 Supreme Court Reporter, page 39, lays down the rule quoting numberless authorities, that "only those acts and "declarations are admissable * * * which are done and "made while the conspiracy is pending and in furtherance of "its object. After the conspiracy has come to an end, whether "by success or by failure, the admission of one conspirator by "way of narrative of past facts are not admissable in evidence "against the others."

Exception 15.

The fifteenth exception relates to an objection made by the plaintiff in error to the Court permitting the Government to cross-examine one of its witnesses, who, before recess, was testifying contrary to the expectations of the United States District Attorney. (Record, folio 69.) We contend that the Court erred in permitting the cross-examination of the witness, be-

cause it is impossible to determine at which time the witness told the truth, and it is the uniform rule of decision that a man is not permitted to impeach his own witness and therefore the objection should have been sustained.

Exceptions 19, 20 and 22.

These exceptions relate substantially to the same matters and will therefore be considered together. The record shows that the testimony of the witnesses on behalf of the Government was taken before the United States Consul at Tahiti, and while one of the witnesses, Thomas Green, was testifying as to facts concerning the defendant and for the purpose of showing that the witness had made contrary statements, counsel asked the right to examine the statements taken before the Consul and then present in Court. (Record, folio 79.) At another time, the counsel for the plaintiff in error requested that they be permitted to examine the statements, taken before the Consul at Tahiti, of each of the witnesses for the purpose of showing that the witnesses had made contradictory statements. The record shows that the statements of the witnesses were lying on the table in front of the United States District Attorney in the court-room at the time that the order was asked for. The Court refused to make the order, refused to permit an inspection of the record by the plaintiff in error or his counsel. (Record, folio 79.) While the witness Green was upon the stand, he admitted upon cross-examination that he had written a letter and made a statement to the United States District Attorney, but the United States District Attorney refused to permit the examination of said letter, or the examination of any of the statements which had been taken down by the Consul at Tahiti at the time that the witnesses for the Government had been examined. This we claim to be error and we cite the Court to the case of *Freel* vs. *The Market St. Cable R. Co.*, 97 Cal., 40, where that question has been decided.

Exceptions 23 and 24.

These exceptions relate to the overruling of the objections of the plaintiff in error to the method of proving the citizenship of the bark Hesper for the purpose of showing that she was an American vessel. The first of these exceptions is taken to the admission in evidence of the certificate of registration of the bark Hesper, and to the ruling of the Court in assuming that proof of citizenship of the owners was sufficiently shown by the certificate of registration of the vessel. There is no stat-

ute of the United States existing which makes such certificate *prima facie* evidence of the facts which it purports to show. There is but one way of showing that a man is a citizen of the United States, if he be a naturalized citizen, by the production of his naturalization papers, and in the case of a native born citizen, by the testimony of the party himself. The other exception is taken to the question asked the captain of the vessel as to what flag the vessel carried on her voyage. This testimony is totally immaterial and incompetent, because it does not show, or tend to show, in any manner or form that the Hesper was an American vessel.

Exception 26.

This relates to testimony given by the captain of the vessel at folio 109, where the captain was permitted to testify as to what shipping was in sight for several days prior to and after the 13th day of January, 1893, the day of the alleged offense. This testimony is also immaterial. The question should be limited to the particular period of time of the alleged killing.

Exception 28.

This exception is taken to the refusal of the Court to give the instruction requested at folio 119, respecting manslaughter; and as this question is fully argued in the brief in the case of Herman Sparf and Hans Hansen, plaintiffs in error, vs. the United States, No. 1085, we shall refer to that as part of our brief in this case.

Exceptions 29 and 30.

These exceptions are taken to instructions given during the course of the charge to the jury by the Court. The first exception being taken to the following instruction given to the jury (folio 27):

"I do not consider it necessary to explain it" (referring to manslaughter) "further, for if a felonious homicide has been "committed of which you are to be the judges from proof, "there is nothing in this case to reduce it below the grade of "murder."

This instruction is argued upon in the Herman Sparf and Hans Hansen case, and as argued there, it takes away from the jury the right to say whether or not any crime at all was committed, and also takes away from the jury the right to say whether or not the plaintiff in error had committed manslaugh-

ter. The other instruction instructs the jury (folio 30), "that "if Maurice Fitzgerald was killed, and Thomas St. Clair did not "do the act alone but was present and willingly aided and "abetted in its perpetration, I charge you that he is guilty of "murder as charged in the indictment." This instruction is erroneous for the reason that the crime of murder is not charged in the indictment and we here also refer to our argument in the the Sparf and Hansen case.

Exception 31.

The thirty-first exception is taken to the verdict rendered by the jury. That verdict does not find the defendant guilty of any offense whatever. In the charge given by the Court to the jury (Record, folio 31, page 12), the Court instructed the jury that if they found the defendant guilty, their verdict should be "We, the jury, find the defendant guilty of murder." The jury, however, merely found the defendant "guilty" (Record, folios 22 and 120). The plaintiff in error excepts to this verdict upon the ground that it is the duty of the jury to find specially by their verdict of what crime he was guilty under the indictment, inasmuch as a verdict for four distinct offenses can be found under an indictment charging murder upon the high seas. Section 1035 of the revised statutes provides "in all "criminal cases the defendant may be found guilty of any "offense the commission of which is necessarily included "in that with which he is charged in the indictment, or "may be found guilty of an attempt to commit the offense "so charged, provided, that such attempt be itself a separate "offense." In *United States* vs. *Leonard*, 2 Fed. Rep., 669, under an indictment charging murder, the defendant was convicted of manslaughter and it was held in that case that the verdict was proper.

See also *Ball* vs. *U. S.*, 140 U. S., page 136.

In the trial of an indictment for murder in the first degree a verdict of guilty must specify the degree of which the defendant is convicted. A statement that the defendant is found guilty in the manner and form as charged in the indictment is not sufficient, even though the offense is charged to have been committed by poison, where there is but a single degree of crime, and that, murder in the first degree. (See 9 Am. and Eng. Encyc. of Law, page 748, and cases there cited.) Also *Kendall* vs. *The State*, 65 Ala., 492. In *State* vs. *Burdon*, 38 La. Annual, 357, the Court said: "All the essential facts must

be found by a special verdict in order to enable the Court to give a judgment of law upon the matter in issue. Nothing is to be taken by the Court by implication or intendment; what is not found is supposed not to exist."

See also *State* vs. *Foster*, 36 La. Annual, 877.
Slaughter vs. *State*, 24 Tex., 410.
People vs. *Ye*, 31 Cal., 452.
People vs. *Lee Yune Chong*, 94 Cal., 379, and cases cited at page 386.
Proffat on Jury Trials, Sec. 436.

Exceptions 33, 34 and 35.

The first two of these exceptions are take to the refusal of the Court to grant the motion of the plaintiff in error for an arrest of judgment. (Record, folios 121 and 122.) Of course, if the objection taken to the verdict is good, then these objections are certainly well taken. It appears from the record that upon receipt of the verdict of the jury of guilty, that the only order the Court made, as shown by the bill of exceptions, was as follows (Record, folio 121): "It is ordered that sentence be pronounced on Thursday, July 6, 1893." This order of remand does not find the defendant guilty of murder, nor does it remand him for sentence upon a charge of murder. It will be perceived that neither in the verdict nor in the order remanding the plaintiff in error for sentence, made on the 20th day of June, 1893, is it stated of which offense he was found guilty, nor is there anything in said verdict or order which can be made the basis of a judgment sentencing the defendant to death. And such being the case, all the exceptions are well taken.

Exception 36.

This exception is taken to the order of the Court in not fixing the place where the execution of the plaintiff in error should take place. The language of section 722 of the Revised Statutes seems to necessarily imply that in sentencing a prisoner to death, it must be done in accordance with State practice, and if that be so, the Marshal of the Northern District of California should have been directed to take the prisoner to one of the State Prisons of the State of California, and he should have been directed to hang the plaintiff in error at that place, and that place only, and no discretion should have been by the judgment of the Court given to the marshal as to the place where the hanging was to take place. Penal Code of California, section 1229, provides where the hangings within the State shall take place.

Exception 37.

This exception has been fully considered under one of the preceding exceptions covered by the assignment of errors.

Exception 38.

The judgment in the case entered (Record, folios 33 and 34) is totally insufficient. It does not follow the indictment in the case nor is it in accordance with the verdict rendered. Therefore, it is insufficient for the purpose of being a basis under which the plaintiff in error could be executed.

Exception 40.

At the time that the Court instructed the jury and at the time that the defendant requested that certain instructions be given to the jury no formal exceptions were taken to the refusal of the Court to give the instructions, nor were any formal exceptions taken to the instructions given, for the reason that section 1176 of the Penal Code of the State of California provides as follows: "When written charges have been presented, "given or refused, or when charges have been taken down by "the reporter, the questions presented in such charges need "not be excepted to or embodied in a bill of exceptions, but "the written charges or the report, with the endorsements "showing the action of the Court, form part of the record, and "any error in the decision of the Court thereon may be taken "advantage of on appeal in like manner as if presented in a "bill of exceptions." They also form part of the judgment roll (Penal Code, § 1207). For that reason we contend that the instructions refused, forming part of the judgment roll, can be argued upon the same as if they had been incorporated into the bill of exceptions.

See charge to the jury (Record, folios 24 to 31).

See certified copy of defendant's instructions, which are on file, but were omitted from the Record.

The plaintiff in error respectfully urges upon the attention of the Court that the testimony which is fully set out in the bill of exceptions fails to show that he has been guilty of any offense whatever; and it is clearly set out, we believe, in this brief, that the indictment in the case is defective, and that the Court erred in the method of impaneling juries in the admission and rejection of testimony. Also, that the Court erred in accepting the verdict rendered by the jury, which fails to find the defendant guilty of any offense, and upon that verdict di-

recting that the plaintiff in error be hanged by the neck until he be dead. We urge upon the attention of the Court that this case is in many respects similar to the case of *Ball* v. *The United States*, reported in 140 U. S. at page 118, and that the indictment in this case, like the indictment in that case, fails to charge the defendant with the crime of murder; also, that the verdict itself is totally insufficient upon which to base the sentence of death; and we respectfully submit that the judgment herein should be reversed and the cause remanded to the Circuit Court.

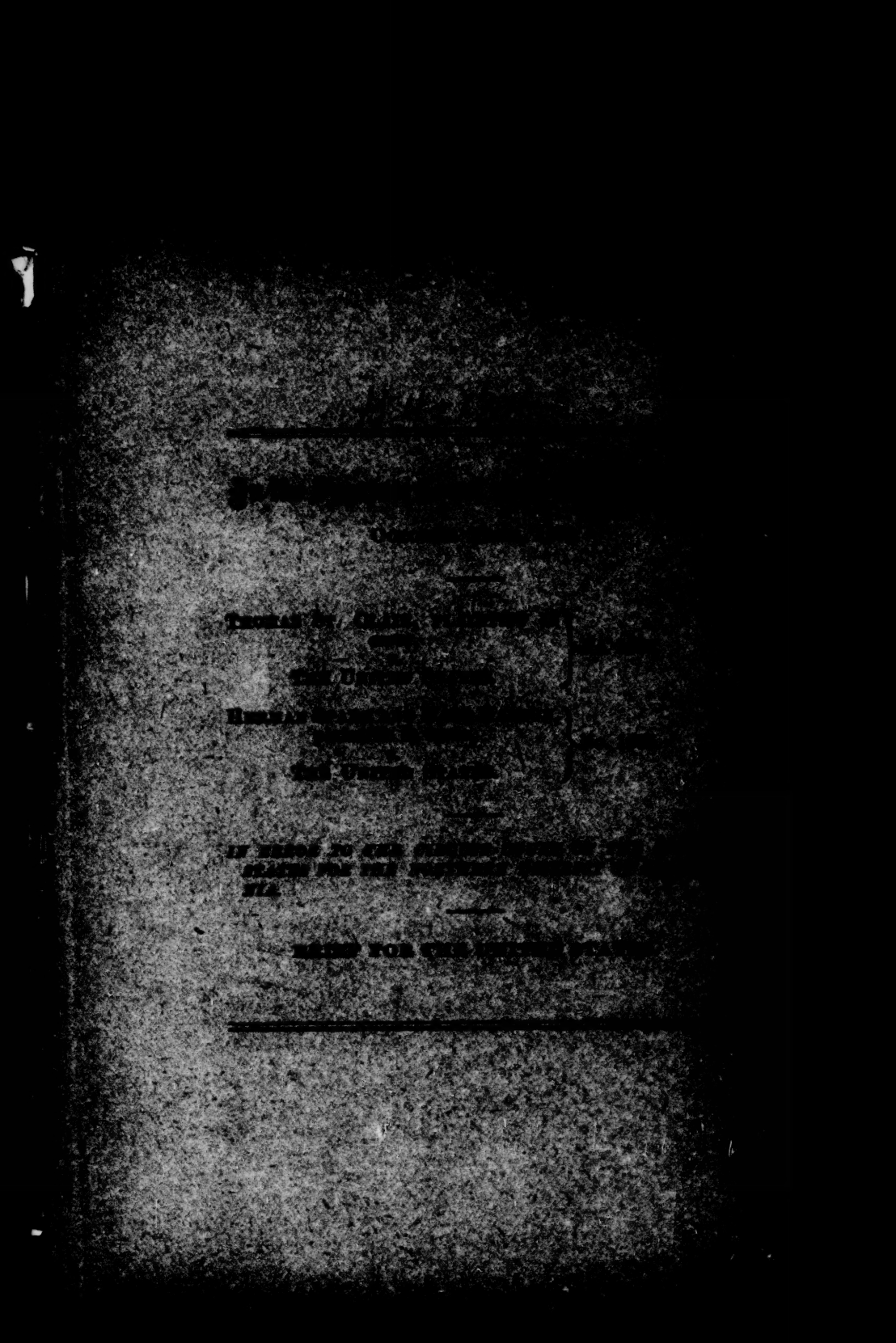
Respectfully submitted,

F. J. KIERCE,

Attorney for Plaintiff in Error.

J. F. SMITH,

Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THOMAS ST. CLAIR, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 1062.

HERMAN SPARF AND HANS HANSON, plaintiffs in error,
v.
THE UNITED STATES. } No. 1085.

BRIEF FOR THE UNITED STATES.

These two cases, growing out of the same transaction, will be argued together in this brief.

On the 20th day of June, 1893, the plaintiff in error, Thomas St. Clair, was convicted in the circuit court of the United States of the ninth judicial circuit in and for the northern district of California, on an indictment found on the 5th of May, 1893, in the district court of said district, which charged—

> That Thomas St.Clair, Herman Sparf, and Hans Hansen, mariners, did on the 13th day of January, 1893, with force and arms, on the high seas, within the jurisdiction of this court, and within the mari-

time and admiralty jurisdiction of the Unitd States, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same then and there being a bark called and named the *Hesper*, then and there belonging to a citizen or citizens of the United States of America whose name or names is or are to the grand jury unknown, did kill and murder one Maurice Fitzgerald, then and there being on board said vessel.

THE FACTS.

The *Hesper* was making the voyage from Australia to Honolulu. It left Newcastle on the 22d of December, 1892, with a crew consisting of 14 persons. The ship's crew was divided into two watches, one called the "starboard" watch, which is the captain's watch; the other called the "port" watch, which is the mate's watch. The watches consisted of four hours at a time, except the afternoon watch, from 4 to 8 o'clock, which is divided into two watches of two hours each. The watches relieve each other every four hours. The man at the wheel strikes a bell for the watch to come on deck at 12, 4, and 8 o'clock. A watch is always called before 8 bells, which means 12 o'clock, 8 o'clock, and 4 o'clock. Every half hour is one bell. The seamen call each other and the officers call the officers. When one watch is performing duty the other watch is supposed to be sleeping during the day or the night.

On the 13th day of January, 1893, the "starboard" watch consisted of Maurice Fitzgerald, the second mate; Thomas St. Clair, Herman Sparf, Hans Hansen, and Edwin Larsen.

The "port" watch consisted of John Lucas, first mate; Thomas Green, Jens Olsen, Henry Westerlind, and Pandy Secaria.

On the night of the 13th of January, 1893, John Lucas, the first mate, was called out at about five minutes to 12 o'clock, by Herman Sparf. He dressed, and as he was going on deck eight bells struck for 12 o'clock. He walked rapidly to the man at the wheel and asked where the second mate was. He called for him and received no answer. He went to the captain's cabin and reported that he could not find the second mate. The captain came on deck and inquired of the "starboard" watch, which had been on duty from 8 to 12 o'clock, if they knew where the second mate was who had charge of their watch; to his inquiry he received no reply. The carpenter was called on deck, and the search for the second mate was continued. The "starboard" watch, which had gone off duty at 12 o'clock, had gone below and was called again to the deck by the mate and was not permitted to go to their bunks to sleep, but was required to remain on deck and go aft. The deck of the vessel was loaded with coal about 10 or 12 feet high. The top of it was floored over with some hard wood and on top of that a deck was laid of 2-inch planking.

About twenty minutes past 12 o'clock the captain discovered blood on the deck; about 7 or 8 feet from the mainmast one spot of blood was about 2½ feet long. The next morning there was found on the edge of the gangway a narrow strip of scalp with a small piece of hair stuck together by blood attached to it. The hair was black, tinged with gray, and was recognized by the captain as the hair of the second mate, who was missing. There was also found a broom covered with blood

alongside the ladder; and beneath the bunk of St. Clair, the plaintiff in error, there was found a hatchet which was greasy; and on the deck, near to where the blood was seen, there was found a wooden bludgeon. After the captain discovered the blood he called the starboard watch into the cabin. He saw blood on one of the cheeks of Herman Sparf. The men all said they could not account for the blood on the deck—that they had heard nothing during their watch from 8 to 12. Herman Sparf said that he had seen the second mate go up the fore rigging, but had not seen him come down. The captain sent them to their bunks to go to sleep.

Edward Larsen, a member of the starboard watch, relieved St. Clair at the wheel at 10 o'clock; the second mate was then close by the wheel when relieved by Larsen. St. Clair went forward on the deck. At that time the mate was aft. St. Clair returned and told the mate that something was carried away, and he went forward and the mate followed him. It was very dark at the time and that was the last Larsen saw of the second mate. Shortly after St. Clair and the second mate went forward Larsen heard a dog bark and a man holler (p. 29). At half past 10 Capt. Sodergren and his wife, who were together in the cabin, heard the dog bark and two sounds like a human voice in distress (pp. 19, 20, 23, 42).

The barking of the dog and the sound of the voice were heard also by John Langlais, the ship's carpenter (p. 40), and M. P. Luck, the steward, but they only fix it between 8 and 12 o'clock.

Herman Sparf, who was of the "starboard" watch and whose place was on deck, came to the forecastle, where the "port" watch were sleeping, and called Jens

Olsen "at a quarter to 11 o'clock to give them a hand to throw the captain overboard" (p. 39). And about the same time he woke up Thomas Green and said something to him which Green could not understand. Green went on deck in his underclothing; as he was going on the "starboard" side he saw Hansen with a broom in his hand, and when

> he went on the deck-load he found St. Clair, Hans Hansen, and Herman Sparf standing there. He said to St. Clair: "What's the matter; what's the news." St. Clair said: "We want you to give us a hand to throw the old man overboard," referring to the captain. So I says: "How are you going to get him on deck," and he says: "One of us will let go the peak halyards and one of us will go around to the wheel, and when he comes on deck then will be the time to do away with him." So I says: "Where's the second mate?" He says: "He has gone overboord; can't you see the blood on the deck." So St. Clair says: "What do you say," and I says: "Wait until I go and put a pair of pants on" (pp. 33–34).

Jens Olsen did not go on deck when called by Sparf at a quarter to 11, and did not see St. Clair until he went on deck at 12 o'clock, when he saw him walking on the deck load on the starboard side, aft of the mainmast.

The hatchet, which was found under the bunk of St. Clair (p. 23), was identified by Hong, the cook (p. 32), as the one which St. Clair had borrowed from him at half past 6 o'clock the evening before, to cut wood with.

At half past 10 o'clock, on the night of the homicide, St. Clair had on a blue serge coat, buttoned up, at the time he came back to the wheel and told the mate that something had been carried away, and he and the mate

went forward together (p. 29). When Capt. Sodergren saw St. Clair on the deck, helping the mate to light the lamp, about a quarter after 12 o'clock, he had only a shirt on (pp. 21–28)—a gray shirt; the captain saw no blood on it, and he went into the forecastle to discover whether there was blood on the men's clothing (p. 25). Pandy Secaria had left St. Clair at the wheel about 9 o'clock that night; he saw him next after 12 o'clock, when the first mate was inquiring: "Where is the second mate?" He saw him again a few minutes later, after the starboard watch had gone below, coming out of the forecastle; he had changed his clothes; he had got a shirt on and no pants; he jumped inside the forecastle; he had a bundle of clothes in his hand and he chucked them overboard (pp. 43–44).

Thomas Green saw St. Clair about 12 o'clock that night, or a little after, have some clothes and throw some clothes overboard. He had some clothes rolled up in a bundle and threw them overboard in front of Green. St. Clair's hands had blood on them at that time (pp. 34 and 35).

After the mate had disappeared that night, and after St. Clair, Sparf, and Hansen were placed in irons, Sparf said to Edward Larsen, in Swedish, "not to say anything about it." And the same night the plaintiff in error, St. Clair, had said to Thomas Green in the forecastle, "say nothing about it, Tom."

CORPUS DELICTI.

The body of the missing mate was never found. No eyewitness of the homicide testified on the trial of this cause, and yet the testimony, as it appears in this rec-

ord, leaves the mind without doubt as to the murder of Fitzgerald.

> It is clearly established that it is not necessary that the *corpus delicti* should be proved by direct and positive evidence, and it would be most unreasonable to require such evidence. (Wills on Circum. Ev., 179).

A case strikingly like the present is presented in Rex *vs.* Hindmarsh (2 Leach C. C., 591), where a mariner was tried for the murder of his captain at sea. A witness stated that the prisoner had proposed to kill him, and that being alarmed at night by a violent noise he went upon deck and saw the prisoner throw the captain overboard, and that he was not seen or heard of afterwards; and that near the place on the deck where the captain was, a billet of wood was found; and the deck and part of the prisoner's dress were stained with blood. It was urged that as there were many vessels near the place the probability was that the captain had been picked up by some of them and was then alive; but the court left that question to the jury, and the prisoner was convicted.

The same question arose in *United States* v. *Williams and Cox*, (1 Clif., 20), in which Justice Story is quoted as saying, in another case (2 Sumner, 19):

> In cases of murder upon the high seas the body is rarely, if ever, found, and a more complete encouragement and protection for the worst offenses of this sort could not be invented than a rule of this strictness. It would amount to a universal condonation of all murders committed on the high seas.

Here, Capt. Sodergren has proved that neither on the evening of the 13th of January, nor of the next morn

ing, nor of several days about that time, were any vessels in sight (p. 49).

The errors of which the plaintiff in error complains are specifically assigned (pp. 57–60), and will be considered briefly in the order in which they are there presented:

1.

Overruling demurrer to indictment.

The grounds of demurrer are assigned on page 5.

(*a*) Failure to show on what portion of the high seas the alleged offense was committed.

(*b*) Failure to show which of the defendants, if any, committed the alleged assault, and whether one or more of the defendants committed any of the acts charged.

The indictment was found against St. Clair, Sparf, and Hansen jointly, and charged that they jointly did kill and murder Fitzgerald.

If the proof shows that any one or more of the defe nd ants were guilty as charged those so proven guilty can be convicted. (Wharton Crim. Prac. and Pleading, 19 ed., secs. 312 and 313.)

The indictment charges that the offense was committed on the high seas, within the jurisdiction of the United States, and out of the jurisdiction of any particular State, and that is sufficient.

2, 3, 4, 10, and 11.

These relate to certain objections to the jury, more particularly set out in the bill of exceptions (pp. 15 to 18).

The act of June 30, 1879, prescribing the manner in which a jury shall be selected, does not repeal

section 804, Revised Statutes, providing for special venire.

(*United States* v. *Rose*, 6 Fed. Rep., 136; *Lovejoy* v. *United States*, 128 U. S., 171.)

It appears (p. 16) that on the 2d of March, 1893, an order was entered discharging the trial jury of the circuit court for the February term, "there being no further business to be brought before them." That on the 29th of May, 1893, of the said February term, the circuit judge presiding, in open court, directed that a venire facias issue, returnable to June 7, 1893, summoning fifty persons to serve as trial jurors; that the indictment here was found on the 6th day of May, 1893, after the regular trial jury had been discharged. That the venire which was ordered to be issued contained the names of fifty persons drawn from the regular jury box of the said circuit court. That it was issued by the clerk and delivered to the marshal; that at the time of the drawing there were at least three hundred names in the jury box. That the fifty persons summoned appeared and attended said circuit court in obedience to their summons. From the whole body of the jurors only eight had been accepted and sworn when the list was exhausted; and the court ordered the marshal to summon twenty-five talesman to appear in court to serve as trial jurors in the case. Up to this point the proceedings for summoning a jury were in conformity with the statute, as settled by the decisions of the court in cases cited above. (*United States* v. *Loughery*, 13 Blatch., 267.)

5, 6, 7, 8, 9.

These relate to the claim of the plaintiff in error to exercise his right of peremptory challenge only after twelve jurors have been found qualified to serve.

After twelve persons who had been drawn and summoned as aforesaid were regularly called into the jury box, but before they were sworn to answer questions, counsel for the defendant objected to and challenged the panel thus called on the same ground as stated to the general venire. The court required the defendant to exercise his right to a peremptory challenge, as to a juror, after each juror had been examined as to his qualifications and accepted. The defendant claimed the right to examine all of the jurors as to their qualifications before exercising the peremptory challenge as to any one of them.

Brewer v. Jacobs
22 F. R. 217.
U. S. v. Rondeau
16 F. R. 109

Rule 63 of the said circuit court provides as follows:

> In all criminal trials the designation empanelling or challenging of jurors shall conform to the laws of this State existing at the time, except as otherwise provided by acts of Congress or the rules of this court. But a juror shall be challenged or accepted and sworn in the case as soon as his examination is completed and before the examination of another juror (p. 17).

The court then was simply conforming to the requirements of this rule, and was not violating any act of Congress. The whole matter would seem to be in the discretion of the court. (Wharton's Crim. Prac. and Plead., 9 ed., sec. 13.)

12.

To overruling the objection of the defendant to the question asked F. O. Sodergren on direct examination:

> Q. When you came on deck you made this search, and then you asked the man at the wheel where the mate was?

and in permitting the witness to answer the same.

I am unable to find this question anywhere in the examination of the witness, F. O. Sodergren, as that is certified in this record (pp. 18–25 and 49). On p. 20 the witness stated in his narrative that after he came upon deck he went to the wheel and spoke to Edward Larsen, who was at the wheel. The witness was then asked, "Do you know how long Larsen had been at the wheel when you asked him *that question*?"

The witness had not stated that he had asked Larsen any question, but seems to admit by his answers that he had. If any question was asked it is not reported in this testimony. He had called the starboard watch and asked them all together if they knew what had become of the second mate, and they answered "no." Through which one this answer was made does not appear.

But the question objected to, if ever propounded, was not answered by the witness, and however improper the question may have been in absence of the answer, there is no ground of error.

13.

To overruling the objection of the plaintiffin error to the witness, F. O. Sodergren, testifying as to what anyone said, unless the plaintiff in error was present, I find no exception noted in the course of Sodergren's examination to which this assignment can refer, unless it be to No. 12.

14.

Because the court refused to strike out the testimony of the witness, F. O. Sodergren as to the condition of Herman Sparf, there being no charge of conspiracy in the indictment and Sparf not being on trial.

Capt. Sodergren was master of the ship, and had been

called on deck by the first mate as soon as it was discovered that the second mate was missing.

Herman Sparf was one of the starboard watch on the deck when the second mate disappeared. After the evidences of crime had been discovered on the deck, the blood, the instruments, and the conduct of the individuals, the captain called the starboard watch into the cabin, and there he "saw blood on one of the cheeks of Herman Sparf." This is the statement which is asked to be stricken out. It is difficult to see why, if this statement is stricken out, the statements of all the witnesses as to the condition of the scene of the transaction should not also be expunged. If not the blood on this man's cheek, why the blood on the deck, on the railing, on the ropes, and on the clothing? Can any stronger form of evidence be adduced than that of the state and condition of the insensible and inanimate articles that entered into and formed part of the locus of the transaction.

Dr. Wharton, in his Criminal Evidence, 8th edition, section 777, says:

> Traces of blood in cases of homicide, near the corpse, or in the way leading to or from it, or marks or spots of blood upon the person or clothes of the accused, should be carefully examined with a view to the solution of any or all of the following inquiries.

In every investigation of this sort the effort is and should be to present to the mind of the jury a complete and accurate picture of the immediate scene of the transaction, with every feature distinctly drawn. If it occurred in a house, a description of the house, its interior arrangement, the position and relation of the

furniture immediately before and after the occurrence. If it occurred out of doors, the appearance of the grass, the ground, the leaves. How often does it occur that the jury itself is taken out to view this ground, that their impression may be more real and accurate.

Dr. Wharton (Criminal Evidence, section 797) says:

> When there is an inspection of the scene of guilt it must be shown what changes, if any, have taken place since the guilty act.

And from section 795 to 799 he treats of "the inferences from extrinsic indicatory proof."

15.

To allowing counsel for prosecution to cross-examine a witness called by him, whose testimony had taken him by surprise.

In 1 Greenleaf on Evidence, 15 ed., sec. 444, after stating the conflicting views on this question it is said:

> But the weight of authority seems in favor of admitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe to what he would testify, or that the witness has recently been brought under the influence of the other party and has deceived the party calling him. For, it is said, that this course is necessary for his protection against the contrivance of an artful witness, and that the danger of its being regarded by the jury as substantive evidence is no greater in such cases than it is where the contradictory allegations are proved by the adverse party.

16.

To overruling the objection of the plaintiff in error to the question asked the witness Edward Larsen, "were

you ever present before the disappearance of the second mate, when the subject was discussed of taking the ship?"

By referring to the question as actually propounded to the witness (p. 30) it will be seen that the counsel for the prosecution added to the question these words: "I place that when St. Clair was present," St. Clair being the defendant The question was then directed to a conversation at which the defendant was present and took part. It refers to an occasion when the subject was "discussed" of the very crime which is here the subject of investigation. The answer being—

> St. Clair, Hansen, and Sparf were there. Sparf said he wished the captain was killed and we would take the ship and be our own boss. I asked Sparf how he would kill the captain, and St. Clair said, "They don't understand the business."

17.

To the refusal of the court to strike out the testimony of the witness, Edward Larsen, as to what Hansen said when the plaintiff in error was not present.

I do not find in Larsen's testimony the statement of Hansen, referred to in this assignment. But three exceptions appear as noted during the course of Larsen's examination, and this is not one of them. It does not appear what is referred to by this objection.

18.

To the refusal of the court to strike out the testimony of Thomas Green, as to what he saw Hansen doing.

The witness stated (p. 33) that as he was turning the corner of the house, going on the starboard side, he saw the man Hansen with a broom in his hand.

This was between 11 and 12 o'clock, and must have been a very short time after the homicide took place. It was the testimony of a witness as to the spectacle that was presented to his eye on the immediate theater of the occurrence, and I am unable to perceive the ground upon which the objection to its admissibility rests. The fact that the indictment does not charge a conspiracy can have nothing to do with the rule of evidence which requires every fact and circumstance connected with the transaction to be laid before the jury. There might be some color of reason in an objection to the introduction of a verbal statement or declaration which was not a part of the *res gestæ*.

But this could have no application to the conduct and actions of those who were seen by the witness when he first appeared on the scene. The appearance of things as they were presented to his eye on that occasion is perhaps the most reliable light that can be thrown upon the case.

19.

To the refusal of the court to compel the district attorney to submit to the counsel for the prisoner the statements of witnesses taken before the U. S. consul at Tahiti.

It seems that the preliminary examination of some of the witnesses had been taken at Tahiti and their statements written out. And it appears, on page 34, that these written statements were lying on the table in front of the U. S. district attorney, in the court room, at the time this extraordinary motion was made. It will be seen that the court very properly declined to make any ruling at all on the motion, saying, what was obviously true, that he had no authority to order any testimony

out of the hands of the district attorney. And so, the exception was taken, not to any ruling of the court, but as expressly stated on page 34, "We except to the refusal of the district attorney to permit us to inspect the statements in writing, made by these witnesses before the consul at Tahiti. With as much propriety might he have objected to the refusal of the district attorney to allow him a private preliminary examination of any witness who had been summoned for the Government, but not yet called to the stand by the Government's attorney. In fact these written statements were not competent substantive evidence at all, and were nothing more than private memoranda, used by the district attorney doubtless for intelligent examination of witnesses, whether called for the prosecution or defense.

20.

To the refusal of the court to compel the production of the letter written by the witness Thomas Green to the U. S. district attorney, together with a statement taken down by him at the same time.

The whole matter appears on pages 36 and 37. The witness, in the course of his narrative, after describing the transaction as far as he knew it, said: "I wrote a letter to the prosecuting attorney about it," whereupon counsel for the prisoner said: "We call for that letter," to which the district attorney replied: "I do not recollect the letter and I do not know that I can find out; if I can, I will let you have it." Whereupon the witness was allowed to state the substance of the letter. The witness then further testified that he had made a statement to the district attorney, whereupon the counsel

for the prisoner demanded that that statement be produced in evidence, although it was not shown to have been in writing. The district attorney then said:

> I find I have a copy of the letter here in my notes, and I shall request that the letter be read to the jury, inasmuch as it has been called for. I offer that letter to the gentleman; but he must not read anything further; it is in my note book.

The counsel for the prisoner declined to read the letter. The court interposed and said: "The counsel offers you the letter, and that you can accept or not, but you need not look at the notes further than that."

At a later day of the trial the district attorney said:

> The other day there was a demand made here by counsel connected with the cross-examination of the witness as to an interview which occurred in my office and as to a letter which had been written, or which the witness said he had written to the district attorney. The original not being at hand, and a copy having been taken by the shorthand reporter at the same interview, I offered to read the letter. That was declined on the ground that if the letter went in the whole statement should go in. I now propose to read that letter and afford counsel an opportunity to look at the statement in its fullness, so that he may know everything that occurred at that interview.

But the counsel for the prisoner objected and declined the offer of the district attorney.

This seems to dispose of this exception.

21.

To the ruling of the court in allowing the witness Jens Olsen to state who had called him on the night of the homicide. The witness had stated: "I was called at a quarter to 11 to give them a hand to throw the

captain overboard." He was then asked the question, "who called you?" to which he answered "Herman Sparf."

It will be observed that no objection was made to the question, and only when the answer was given was the motion made to strike it out.

But both question and answer were manifestly proper.

Capt. Sodergren had testified that he had gone on deck at a quarter to 10 o'clock to take a look around before he retired, and at ten minutes after 12 he had been called by the first mate, who was then looking for the second mate.

Edward Larsen had testified (p. 29) that he had seen the second mate at half past 10, and that at twenty minutes of 12 St. Clair, the defendant, came aft and said "Hansen wanted to take the wheel."

Thomas Green had testified (p. 33) that between 11 and 12 o'clock Herman Sparf came down in the forecastle and woke him up. He went on deck and found St Clair, Hansen, and Sparf standing there. He said to St. Clair: "What's the matter; what's the news?" And St. Clair said: "We want you to give us a hand to throw the old man overboard," referring to the captain.

And now it is objected that the statement of Jens Olsen, that this same Herman Sparf had called him at a quarter to 11 to give them a hand to throw the captain overboard, should be stricken out, because St. Clair was in no way connected with it, and that no conspiracy had been established. It rarely, if ever, occurs that all the facts of a transaction can be proven by one witness, and it has rarely occurred that the undesigned coincidences proven by a number of witnesses have been so nicely fitted and dovetailed together as appears

from the testimony of these witnesses already quoted. The testimony was admissible as constituting a part of the original transaction; it was admissible as corroborative of the testimony of the preceding witnesses, which had been admitted without objection.

22.

On the refusal of the court to allow the plaintiff in error to inspect the testimony of witnesses taken before the U. S. consul at Tahiti. This has already been considered and disposed of.

23.

That the court overruled the objection of plaintiff in error to the certificate of registration of the bark *Hesper* and in assuming that the citizenship of the owners of the vessel was sufficiently proven by the certificate of registration. The matter appears on pages 41, 42.

McCoy, register clerk of the San Francisco custom-house district, produced the original register of the vessel *Hesper* and by agreement of counsel the ownership of the vessel was established.

The ground of the objection seems to be that the certificate of registry was not competent or sufficient evidence.

In *United States* v. *Seagrist* (4 Blatch., 420) the objection was urged that the proof was not by certificate of register; but the court held there that the fact that the vessel was American property was sufficient proof of national character to support the indictment.

In the *Mohawk* (3 Wall., 571) this Court said:

> The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations and to enable her to assert that nationality wherever found.

The vessel called the *Hesper* had been duly registered, and the record of her registration was produced by the registry clerk (p. 41).

Sections 4132, 4133, 4134, Revised Statutes, prescribe the character of the vessels entitled to registry and provide that such vessels shall be owned by residents of the United States.

The presumption then, from the fact of registry, is that the owners of the *Hesper* were residents in the United States. She carried the American flag (p. 42).

In *United States* v. *Holmes* (5 Wheat., 419) it was held that under the circumstances of that case (which it will be seen were not near so strong as these) the burden of proof of the national character of the vessel on board of which the offense was committed was on the prisoners.

The flag carried by the vessel *Hesper* was an element of proof, tending to show her national character, and was relevant to the issue here as to the jurisdiction of the court.

25.

To overruling the objection of the plaintiff in error to the introduction in evidence of the "tin can," "club," and "hatchet," referred to in the bill of exceptions.

It is certified at the bottom of page 46, that—

> No exception was taken to the ruling of the court admitting this evidence.

The testimony is objected to on the ground that it was not connected with the defendant.

Captain Sodergren had testified (p. 22) that on the morning after the homicide he "saw a narrow strip of scalp, with a small piece of hair stuck together by

blood, attached to it right on the edge of the gangway. It was dark hair with tinge of gray—and I would say it was the second mate's hair." Thomas Green had put this in a tin can; the captain had had the lid soldered on the can and preserved it, and gave it to the U. S. marshal. The hatchet had been taken from under the defendant's bunk. The captain had found the club close to where the blood was on the deck load and he handed both these articles to the U. S marshal (pp. 22, 23).

The Chinese cook identified the hatchet as his, and proved that at half past 6 o'clock on the evening of the 13th of January the defendant, St. Clair, had borrowed this hatchet from him, saying that he wanted to cut wood with it.

Can any just and adequate impression be formed of this transaction, if evidence of such circumstances as these, which characterize and illustrate it, be excluded from the jury.

26.

To allowing the question to be propounded to Capt. Sodergren as to whether there was any shipping in sight on the night of the 13th of January and for several days prior and subsequent thereto.

We have already anticipated this in treating of the *corpus delicti*.

27.

To allowing Jens Olsen to testify as to conversations had with Herman Sparf and Hans Hansen on the night of the homicide.

The indictment charged these two men with the commission of this offense jointly with St. Clair, the defendant.

The witness, Olsen, has already stated (p. 39) that about a quarter to 11 he had been called by Herman Sparf to give them a hand to throw the captain overboard, and that he had not seen St. Clair before 12 o'clock that night, when he came on deck. The witness did not leave the forecastle when Sparf called him; but states, on cross-examination:

> When I came out of the forecastle Green and all the port watch walked out together. At 12 o'clock, when Green came out with me, St. Clair was walking on the starboard portion of the deck covered with planking (p. 39).

Green had previously stated (p. 33)—

> When I turned in Olsen, Westerlind, and Pandy Secaria were in the forecastle. Herman Sparf came down in the forecastle and woke me between 11 and 12 o'clock. * * * I went on the deck-load and St. Clair, Hans Hansen, and Herman Sparf were standing there. I said to St. Clair, "What's the matter; what's the news?" St. Clair said, "We want you to give us a hand to throw the old man overboard" (referring to the captain). So I said, "How are you going to get him on deck?" And he says, "One of us will let go the peak halyards and one of us will go around to the wheel, and when he comes on deck then will be the time to do away with him." So I says, "Where's the second mate?" He says, "He has gone overboard; can't you see the blood on the deck?" And St. Clair says, "What do you say?" And I says, "Wait until I go and put a pair of pants on."

Here, then, is the connection between the statement made by Herman Sparf to the witness, Olsen, and St. Clair, the defendant.

> All facts that go either to sustain or impeach a hypothesis, logically pertinent, are admissible. (Wharton's Crim. Ev., sec. 24.)

28, 29, 30.

These assignments of error relate to the instructions to the jury given and refused by the court on the trial. The charge to the jury (pp. 9–12) is a clear and accurate expression of the law governing the case and seems to be free from errors of omission or commission. The definition it gives of "manslaughter" is the same as that contained in the instruction asked for by the defendent and refused by the court, except that to the latter is added the words "without any mixture of deliberation whatever." These words form no part of the correct definition of that offense as stated by any recognized authority. The offense is defined in section 5341, Revised Statutes.

The presence of malice in murder and its absence in manslaughter is the distinguishing characteristic of the only two grades of homicide defined in the Federal statutes. The legal meaning of "malice" in homicide embraces all cases where the act was done with such cruel circumstances and means as to indicate a wicked, depraved, and malignant spirit.

(*United States* v. *Cornell*, 2 Mason, 91; *United States* v. *Harriman*, 1 Hughes, 525; *United States* v. *Freeman*, 4 Mason, 505.)

The evidence in this case too plainly shows, as the court charged the jury, that if a felonious homicide had been committed at all, of which the jury alone were the judges, there was nothing in the case to reduce the offense below the crime of murder.

The court was careful, as will be seen on page 12, to caution the jury, that in its charge they must not understand it as assuming any fact at all to be proven.

31.

That the verdict did not find the plaintiff in error guilty of any offense whatever.

The jury found a general verdict of guilty.

> The verdict "guilty" is assumed to refer to the indictment to which it is a response. (Wharton's Crim. Prac. and Pleading, sec. 747.)

32.

Overruling the motion for a new trial.

This court has repeatedly held that this can not be assigned as error here, but rests within the discretion of the trial court. (*Railway Company* v. *Heck*, 102 U. S., 120.)

33, 34, 35, 36.

That the court denied the motions of plaintiff in error for an arrest of judgment and for judgment of acquittal.

The grounds of these motions appear on page 55, and have all of them been heretofore considered under other assignments of error.

There is no provision by statute requiring the place of execution to be prescribed in the sentence and it is not required by the common law. The sentence (p. 56) directs that the defendant be taken "by the United States marshal to some suitable place in the district" and there hung.

37, 38, 39, 40.

The grounds of these assignments are fully covered in the assignments heretofore considered.

No. 1085.

Herman Sparf and Hans Hanson were indicted jointly with Thomas St. Clair.

St. Clair was tried separately. The other two were tried together; and on Friday, the 25th day of August, 1893, were convicted of murder; and on September 18, 1893, were sentenced to be hung.

THE FACTS OF THE CASE.

The facts proven on the trial of these two defendants were substantially the same as those heretofore stated as proven on the trial of St. Clair, with the addition of certain confessions made by these defendants, which will be hereafter more particularly considered.

ASSIGNMENTS OF ERROR.

These will be found on pp. 69–73, and will be noticed in their order.

Specifications A, B, C, D, E, and Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, have been already considered in the case of St. Clair.

Nos. 14, 15, 17, 18, 19 relate to conversations between the defendants in error and the witnesses on the voyage from Tahiti to San Francisco and before reaching Tahiti.

Captain Sodergren was asked (p. 41) if he had had any conversation with the defendant Hanson touching this transaction and homicide after the night of the 13th of January and before you reached Tahiti?

To which the witness answered:

> I did, sir; there was no one present but Hanson; his statement was made freely and voluntarily. The conversation came about this way: I used to go down and see Hanson frequently and give him papers and reading matter while he was in confinement in irons, and at different times he wished to speak to me about the subject, and I asked him not to. I asked him to keep it until the right time came, and then tell the truth.

And then on page 43 the confession of Hanson is given.

Thomas Green, a witness called and examined on behalf of the United States, was asked (p. 38):

> Did you have any conversation with Hansen (?) Sparf about this matter of the homicide of the second mate, Maurice Fitzgerald, while on the *Tropic Bird* and while on your way from Tahiti to San Francisco?

He answered:

> Yes, sir; we were all under arrest at the time, in irons and in confinement together—that is, Sparf, Hansen, Larsen, and myself. There were no promises made either to Sparf or Hansen to tell anything; no inducements were offered them to tell anything.

The question was then propounded:

> State what was said by the defendants.

To which question it was objected by the defendants—

> That it is immaterial, irrelevant, and incompetent, and upon the ground that the statement is not shown to be and could not be voluntary, while the defendants were in confinement, in chains, under a charge of murder.

The evidence is uncontradicted that the confessions of the defendants were made without any inducement

being held out to them, through either hope or fear. And whatever may be said as to the probative force, or weight, of this class of evidence, it is difficult to perceive upon what ground the admissibility of the testimony could be challenged as immaterial, irrelevant, or incompetent. The issue here was as to the guilt or innocence of the prisoners. That the prisoners themselves had, without the flattery of hope or the torture of fear, confessed in detail all the facts and circumstances of the transaction, can not with any obvious propriety be said to be immaterial and irrelevant to this issue.

Greenleaf on Evidence (15th ed., chap. 12), after remarking that "The evidence of verbal confessions of guilt is to be received with great caution," adds (Sec. 215):

> Subject to these cautions in receiving and weighing them, it is generally agreed that deliberate confessions of guilt are among the most effectual proofs in the law.

And section 219:

> Before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary.

Sections 229 and 230 show the inducements that do not vitiate, and among these is imprisonment, even though it be illegal.

Wharton, in his Criminal Evidence (8th ed, chap. 13), discusses the conditions under which evidence of confession is allowed, and in section 661 says:

> Legal imprisonment, however, does not operate to exclude a confession made during its continuance, when no threats or promises are made.

Here the confession proven by Thomas Green was a statement made to him by Hansen in Sparf's presence and embraced declarations and acts of Sparf himself, who heard the statement and acquiesced in its correctness.

Edward Larsen, who was present at this conversation, gives his version of it on page 46.

Nos. 20, 21, 22, 23, 24, 25, have been considered in the case of St. Clair.

Nos. 26, 27, 28, 29, 30, relate to the charge given by the court to the jury.

To be intelligently appreciated, the entire charge as delivered should be read together. It is obviously unfair and unreasonable to extract sentences, or even paragraphs, from the charge and undertake to pass upon the propriety of them without regard to the context.

In *N. Y., L. E. & W R. Co.*, v. *Estel* (147 U. S., 614), this court said:

> Detached sentences in a charge to a jury can not be selected as grounds of objection, but must be read in connection with the whole charge.

But taking these assignments from Nos. 26 to 28 inclusive, and they are undoubtedly correct definitions of murder, manslaughter, and malice.

Nos. 29, 30, 31, 32, 33, embody the opinion expressed by the court to the jury, that the facts, which the evidence tended to prove in that case, if the jury found them established, could prove only murder and not manslaughter or any offense below murder.

In *Lovejoy* v. *The United States* (128 U. S., 173) this court, speaking through Mr. Justice Gray, said:

> It is established by repeated decisions that a court of the United States, in submitting a case

> to the jury, may, at its discretion, express its opinion upon the facts, and that such an opinion is not reviewable on error so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury.

And in *Simmons* v. *The United States* (142 U. S., 155):

> The judge presiding at a trial, civil or criminal, in any court of the United States is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination.

If homicide was committed at all, the proof which establishes that fact equally establishes the manner and character of the taking off. It establishes beyond all doubt that depravity of heart and atrocity of purpose which constitute the malice that darkens manslaughter into murder.

34, 35, 36.

The same consideration which justified the court in admonishing the jury that the facts which the evidence tended to prove constituted murder, and not manslaughter, required it to refuse the instructions asked for by the defendant, because the tendency and effect of those instructions must open the way to the jury for a verdict for any offense from assault with intent to kill up to murder. It would have been as manifestly improper for the jury in this case to have found a verdict on this evidence of any offense less than murder, or of an attempt to commit murder or manslaughter, as it would have been for them under this indictment to have found the defendants guilty of arson or treason.

37, 38.

These grounds have been heretofore considered in St. Clair's case.

39.

The error assigned here is the general course of conduct of the court in permitting evidence as to the acts or declarations of "alleged conspirators." This assignment is open to obvious objections. There can be no such thing as a general objection to the conduct of a court in admitting or refusing evidence throughout a trial. But the objection must be made and exception taken to each particular ruling of the court as the same is made, and that has been done in many instances throughout this case.

But, again, there are no "alleged conspirators" here; there is no allegation of "conspiracy" as such.

The evidence admitted here has been that of the conduct and declarations made by the defendants during the course of the transaction, which is the subject of investigation here, illustrating and characterizing it, and being, indeed, parts of the *res gestæ;* or, else, they were confessions made by one of the number in the presence and hearing of the others after the commission of the offense.

In *Lincoln* v. *Claflin* (7 Wall., 139)—

> the declarations of each defendant relating to the transaction under consideration were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiff.

HOLMES CONRAD,
Assistant Attorney-General.

154 25 15

Office Supreme Court U. S.
FILED.
MAR 14 1894
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

HERMAN SPARF AND HANS HANSON, plaintiffs in error, v. THE UNITED STATES OF AMERICA. } No. 1085.

THOMAS ST. CLAIR, PLAINTIFF IN error, v. THE UNITED STATES OF AMERICA. } No. 1062.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

HERMAN SPARF AND HANS HANSON, plaintiffs in error, v. THE UNITED STATES OF AMERICA, defendant in error. } No. 1085.

THOMAS ST. CLAIR, PLAINTIFF IN error, v. THE UNITED STATES OF AMERICA, defendant in error. } No. 1062.

Upon suggestion by the plaintiffs in error in these causes of a diminution of the record, in the omission from the printed transcript of certain instructions requested by defendant and refused by the court, a certified transcript of the instructions, together with the action of the court thereon, have been printed and filed with the record.

It is insisted, on behalf of plaintiffs in error, that these instructions, with the alleged action of the court thereon, shall be received and considered by this court as though they were embraced in the bill of exceptions.

The ground of this insistance being that, by virtue and under the authority of the penal code of California, the same effect shall be given by the appellate court to instructions refused by the court, and having such refusal indorsed thereon by the judge, as though such action of the court was duly certified and presented in a formal bill of exceptions.

It is true, to be sure, that section 1176 of the penal code of California does provide:

> When written charges have been presented, given, or refused, or when the charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report with the indorsements, showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions.

It is equally true that section 914 Revised Statutes of the United States provides:

> The practice, pleadings, and forms and modes of proceeding in civil cases other than equity and admiralty cases in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State, within which circuit or district courts are held, any rule to the contrary notwithstanding.

This is the only statute of the United States relating to this subject, and it is limited in its operation to *civil* causes and does not extend to *criminal* proceedings under which these two causes fall.

It is manifest, too, that the California statute was not intended to apply to any other than the State courts, for it provides, not only for proceedings in the lower courts, but for such as may be had on appeal to the supreme court of appeals of that State.

But even if section 914 of the Revised Statutes embraced criminal as well as civil causes, its operation must be limited exclusively to proceedings had in the district and circuit courts on the trial of causes there and could not be extended to the means that might be employed of enforcing or reviewing in the Supreme Court of the United States the decisions of the inferior courts.

In *Chateaugay Iron Co.* v. *Petitioner* (128 U. S., 553 and following), this court, construing section 914 Revised Statutes, after reviewing certain decisions of this court, said:

> In harmony with the foregoing decisions, we are of opinion that section 914 does not extend to the means of enforcing or revising a decision once made by the circuit court. * * * The object of section 914 was to assimilate the form and manner in which the parties should present their claims and defense in the preparation for the trial of suits in the Federal courts to those prevailing in the courts of the State. As we have seen, it does not include State statutes requiring instructions to the jury to be reduced to writing, or those which permit such instructions and certain papers read in evidence to be taken by the jury when they retire, or those which require the jury to be directed, if they return a general verdict, to find specially upon particular questions of fact involved in the issues. And as it does not apply to a motion for a new trial, nor affect the power of the circuit court

to grant or refuse a new trial at its discretion, so it does not cover any other means of enforcing or revising a decision once made by the circuit court.

See, too, opinion of Mr. Justice Gray in *Andes* v. *Slauson*. (130 U. S., 438.)

It is clear, then, that neither under the Revised Statutes of the United States or under the penal code of California can authority be found for requiring this court to recognize the instructions or the alleged indorsements thereon as parts of the records in these causes as though introduced therein and made parts thereof by a bill of exceptions.

ON THE MERITS.

The briefs of the plaintiffs in error in these causes were received after the brief for the United States had been printed and filed; and for that reason the views presented in the briefs for plaintiffs in error are not referred to in the brief for the Government.

In the brief in No. 1062 (p. 10)—

Exception 1. It is urged as a ground of demurrer that the indictment does not charge St. Clair with the crime of murder.

Without charging in specific terms a "conspiracy," the indictment does charge that the three persons, with a certain instrument, then and there held in the hands of one of them, but which particular one was to the grand jurors unknown, did, on the 13th of January, 1893, on the high seas, etc., willfully, feloniously, and with malice aforethought, strike and beat the said Fitzgerald, giving to him dangerous and mortal wounds; and did then and there,

to wit, at the time and place last mentioned, him, the said Fitzgerald, cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him, the said Fitzgerald, in the sea aforesaid. Of which said mortal wounds, casting, throwing, plunging, sinking, and drowning, the said Fitzgerald, in and upon the said high seas, out of the jurisdiction of any particular State of the United States of America, then and there instantly died.

While this indictment does not charge that the defendants struck and beat Fitzgerald and cast him into the sea with the intent to kill him, it does charge that these things were done willfully, feloniously, and with malice aforethought, and that is a sufficient charge of intention. (1 Bish. Crim. Law, sec. 426; 2 Wharton Crim. Law, sec. 106.)

The case of *Ball* v. *United States* (140 U. S., 1191), frequently cited by plaintiffs in error in their brief (p. 11) as 118 United States, held that an indictment which failed to allege the time and place of the commission of the crime was defective.

Here the time and place are distinctly averred, but as the body was cast into the sea and could not be produced or inspected, the *corpus delicti* is dispensed with, as shown in our brief.

The other matters have been sufficiently dwelt upon in the brief heretofore filed for the Government.

HOLMES CONRAD,
Assistant Attorney-General.